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LABOR LAW — NO STRIKE CLAUSE — WHEN "ANY" STRIKE DOES NOT INCLUDE A SYMPATHY STRIKE: BROADLY WORDED NO-STRIKE CLAUSE IS INSUFFICIENT TO ACT AS A WAIVER OF UNION'S RIGHT TO SYMPATHY STRIKE.

Delaware Coca-Cola Bottling Co. v. Teamsters Local 326 (1980).

In November 1975, General Teamster Local 326 (Union) was certified as the collective bargaining representative of the drivers and production and maintenance employees at the Delaware Coca-Cola Bottling Company's (Employer)[1] Wilmington, Delaware plant.[2] In the spring of 1976, the Employer and the Union signed a collective-bargaining agreement covering the production and maintenance employees.[3]

Subsequently, negotiations over a contract for the drivers stalled and the drivers established a picket line at the Employer's plant.[4] Production and maintenance employees refused to cross the picket line[5]

1. Delaware Coca-Cola Bottling Co. v. Teamsters Local 326, 474 F. Supp. 777, 779 (D. Del. 1979), *rev'd,* 624 F.2d 1182 (3d Cir. 1980). Coca-Cola, a Delaware corporation wholly owned by the Coca-Cola Bottling Company of Miami, processes and bottles soft drink ingredients for distribution and sale in Delaware, Maryland, and Pennsylvania. 474 F. Supp. at 779.

2. 474 F. Supp. at 780. Following certification of the Union, contract negotiations were begun. *Id.*

3. *Id.* The agreement was to be effective from June 1, 1976 to May 31, 1979. *Id.*

4. *Id.* After ratification of the production and maintenance employees' agreement, negotiations for the drivers at the Wilmington plant continued for approximately one month. *Id.* These negotiations ceased when the Employer decided to contract with Countrywide Personnel (Countrywide) to supply drivers, and a transfer of Coca-Cola's drivers to Countrywide ensued. *Id.* The Union acquiesced in the transfer and negotiations commenced for a collective bargaining agreement with Countrywide. *Id.* However, on March 22, 1977, the Employer terminated its agreement with Countrywide and the drivers returned to their former positions with Coca-Cola. *Id.* After a one-day strike, the Union and Coca-Cola began negotiating an agreement for the drivers. *Id.* At their second meeting, Union President Frank Sheeran threatened the Employer with another strike if an agreement could not be reached quickly. *Id.* Approximately three months later, on July 19, 1977, the Union called a strike and established a picket line which the production and maintenance employees honored for a period of nine days until they were ordered back to work by the Union. *Id.*

5. *Id.* A refusal by employees to cross another union's picket line is known as a sympathy strike. *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 404-05 (1976). For a discussion of the policy reasons behind the protection afforded to sympathy strikers, *see* note 11 and accompanying text *infra.*

and a nine-day work stoppage ensued.[6] Alleging that the production and maintenance work stoppage violated the express no-strike provision of article 16 of the collective bargaining agreement,[7] the Employer filed suit in federal district court for monetary damages under section 301 of the National Labor Relations Act (NLRA).[8] The district court awarded damages to the Employer, ruling that the Union had waived its right to sympathy strike in the process of collective bargaining.[9] On appeal, the United States Court of Appeals for the Third Circuit[10] reversed, *holding* that a broad, generally worded no-strike clause, in and of itself, does not constitute a clear and unmistakable waiver of the right to conduct a sympathy strike. *Delaware Coca-Cola Bottling Co. v. Teamsters Local 326*, 624 F.2d 1182 (3d Cir. 1980).

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6. 474 F. Supp. at 780. The Union did not challenge the district court's finding that the sympathy strike was an authorized union activity. 624 F.2d at 1184.

7. 624 F.2d at 1184. Article 16 of the collective bargaining agreement provides in pertinent part:

> Section 1: The Union will not cause nor will any member of the bargaining unit take part in any strike, sit-down, stay-in, slow down in any operation of the Company or any curtailment of work or restriction of service or interference with the operation of the Company or any picketing or patrolling during the term of this Agreement.
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> . . . .
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> Section 3: The provisions of this Article, other than as mentioned above, shall not be subject to grievance or arbitration, for the purpose of assessing damages or securing specific performance, or any other matter, such matters of law being determinable and enforceable in the courts.

Id. at 1183-84. The language of § 1 is not a picket line clause. *Id.* at 1185 n.1. A picket line clause is one which specifies the employee's rights and obligations when confronted with a picket line other than his own and is distinguishable from a clause like article 16 which governs the right of the Union to maintain its own picket line. *Id.*

8. 474 F. Supp. at 777. *See* 29 U.S.C. § 185(a) (1976). Section 301(a) provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id. The Employer also sought punitive damages, but this relief was deemed to be unavailable under § 301. 474 F. Supp. at 788, *citing* Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir. 1967).

9. 474 F. Supp. at 782. The district court held that the broad language of the no-strike provision, together with existing case law, which was construed to uphold the efficacy of express strike prohibitions, supported the Employer's contention that the Union had waived its right to sympathy strike through collective bargaining. *Id.* at 782-83. The district court awarded the Employer $67,922.85 in damages. *Id.* at 784-88.

10. The case was heard by Chief Judge Seitz, Judge Rosenn and Judge Norma L. Shapiro of the United States District Court for the Eastern District of Pennsylvania, sitting by designation. Chief Judge Seitz wrote the majority opinion. Judge Rosenn filed a concurring opinion.

The right of employees to engage in sympathy strikes has long been protected under section 7 of the NLRA.[11] This statutory right may, however, be waived in a collective-bargaining agreement provided that the waiver is clearly and unmistakably established.[12] The extent of any waiver in a collective bargaining agreement rests upon the interpretation of the contract as measured by the intent of the parties.[13] The search for the parties' intent involves essentially a factual determination which requires that collective bargaining agreements be read "as a whole and in light of the law relating to it when made." [14] Moreover, courts have construed language strictly and have been reluctant to liberally apply waivers to matters subject to collective bargaining.[15] Consequently, courts have taken the position that express language will not be given an expansive reading.[16]

In the absence of an express no-strike provision, courts have resolved the conflict between the right to strike and the presence of a

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11. *See* 29 U.S.C. § 157 (1976). Section 7 provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.* Section 7 has been construed to include the right to wage sympathy strikes. *See, e.g.,* W-I Canteen Serv., Inc. v. NLRB, 606 F.2d 738, 743 (7th Cir. 1979); Local 12419, Int'l Union of Dist. 50, UMW (National Grinding Wheel), 176 N.L.R.B. 628 (1969).

The policy behind the protection afforded sympathy strikers by the NLRA was articulated in NLRB v. Southern Greyhound Lines, Inc., 426 F.2d 1299, 1301 (5th Cir. 1970). The *Greyhound* court stated:

> Initially, we think it obvious that when an employee, as a matter of principle, refuses to cross a picket line at his own employer's place of business, the employee, even though he is not a member of the striking union, has in effect plighted his troth with the strikers, joined in their common cause, and has thus become a striker himself . . . . Such an employee is therefore entitled to all the protections due under the National Labor Relations Act to those strikers with whom he has joined cause.

Id. (citations omitted).

12. *See, e.g.,* W-I Canteen Serv., Inc. v. NLRB, 606 F.2d 738, 743 (1979) (waiver of right to sympathy strike found through the presence of express no-strike and picket line clauses); NLRB v. C.K. Smith & Co., 569 F.2d 162, 167 (1st Cir. 1977), *cert. denied,* 436 U.S. 957 (1978); Gary Hobart Water Corp. v. NLRB, 511 F.2d 284, 287 (7th Cir.), *cert. denied,* 423 U.S. 925 (1975); Kellogg Co. v. NLRB, 457 F.2d 519, 525 (6th Cir.), *cert. denied,* 409 U.S. 850 (1972); News Union v. NLRB, 393 F.2d 673 (D.C. Cir. 1968).

13. *See, e.g.,* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 279 (1956). For a discussion of *Mastro Plastics, see* notes 36-40 and accompanying text *infra.*

14. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 279 (1956).

15. *See, e.g.,* United Steelworkers v. NLRB, 536 F.2d 550, 555 (3d Cir. 1976) (waiver of certain grievance procedures); Gary Hobart Water Corp. v. NLRB, 511 F.2d 284, 287 (7th Cir.), *cert. denied,* 423 U.S. 925 (1975) (waiver of the right to sympathy strike); NLRB v. Wisconsin Aluminum Foundry Co., 440 F.2d 393, 399 (7th Cir. 1971) (waiver of a union's right to negotiate salary bonuses).

16. United Steelworkers v. NLRB, 536 F.2d 550, 555 (3d Cir. 1976).

contractual waiver by implying a no-strike obligation on the part of the union over issues which are subject to arbitration.[17] This position is commonly known as the common law doctrine of "coterminous interpretation" [18] and was first enunciated by the United States Supreme Court in *Textile Workers Union v. Lincoln Mills.*[19]

In *Lincoln Mills,* a union entered into a collective bargaining agreement which provided that there would be no strikes and that disputes over terms or conditions contained therein were subject to arbitration.[20] After the employer refused to arbitrate a dispute, the union brought suit in federal district court requesting enforcement of the employer's agreement to arbitrate.[21] On appeal, the Supreme Court held in favor of the union, concluding that "[p]lainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." [22]

The quid pro quo concept was reaffirmed and refined in *Gateway Coal Co. v. United Mine Workers.*[23] In *Gateway,* the Court accepted

17. *See* Gateway Coal Co. v. UMW, 414 U.S. 368, 380-84 (1974). *Accord,* Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-06 (1962); United States Steel Corp. v. UMW, 548 F.2d 67, 73 (3d Cir. 1976). *See also* Feller, *A General Theory of the Collective Bargaining Agreement,* 61 CALIF. L. REV. 663 (1973). Commentators are in accord that by agreeing to arbitration, management has evidenced an intent to settle labor disputes in a peaceful manner. *Id.* at 757. Thus, it is only fair that, before an activity as potent and destructive as a strike is employed, the union exhaust the existing administrative procedures. *Id.*

18. For a discussion of the application of the quid pro quo theory to coterminous interpretation, *see* notes 19-28 and accompanying text *infra.* For a discussion of coterminous interpretation generally, *see* Gateway Coal Co. v. UMW, 414 U.S. 368, 380-84 (1974).

19. 353 U.S. 448 (1957).

20. *Id.* at 449.

21. *Id.*

22. *Id.* at 455.

23. 414 U.S. 368 (1974). In *Gateway Coal,* the employer filed suit in federal court under § 301 of the NLRA, requesting that the court enjoin the union's continuing strike and require the union to comply with an arbitration process established under the terms of the collective bargaining agreement. *Id.* at 372. The strike occurred over the reinstatement of employees who had been previously suspended for creating a safety hazard by falsifying records to show no reduction in airflow at a mine when, in fact, the airflow had been substantially impeded due to the collapse of a ventilation structure. *Id.* at 370-72.

The district court issued a preliminary injunction requiring the union to end the strike and submit the issue to arbitration. Gateway Coal Co. v. UMW, No. 71-567 (W.D. Pa. June 18, 1972) (order issuing preliminary injunction). On appeal, the Third Circuit reversed holding that the usual federal policy favoring arbitration of labor disputes was not applicable to issues concerning employee safety. Gateway Coal Co. v. UMW, 466 F.2d 1157, 1159-60 (3d Cir. 1972), *rev'd,* 414 U.S. 368 (1974). The court of appeals found no duty to submit the issue to arbitration and, therefore, no implied duty to refrain from striking. 466 F.2d at 1159. The Supreme Court ruled that the union had a duty to arbitrate the dispute, requiring the union to arbitrate the grievance and cease its striking activity, and reversed the court of appeals. 414 U.S. at 368-69. The court premised its ruling that the union had a duty to

the employer's contention that the union, which struck over reinstatement of certain suspended employees,[24] violated its agreement since the issue underlying the strike was covered by the arbitration clause[25] and, consequently, the union had an implied obligation not to strike.[26] The Court ruled that, absent an explicit intent to the contrary, "the agreement to arbitrate and the duty not to strike should be construed as having coterminous application."[27] Where coterminous interpretation indicates an implied waiver of the right to strike, however, the union has not waived its right to sympathy strike, since the underlying cause of the strike is not between the sympathy strikers and their employer and is, therefore, not arbitrable.[28]

While *Lincoln Mills* and *Gateway* were concerned with agreements which were silent on the strike issue,[29] courts have also considered the effect of an arbitration clause on the scope of an express no-strike provision.[30] In *NLRB v. Rockaway News Supply Co.*,[31] the Supreme Court was confronted with the question of whether an employer could discharge an employee who, contrary to the broad, express no-strike clause contained in the collective bargaining agreement,[32] refused to cross a picket line which was maintained by a sister union and aimed at an employer other than his own.[33] The Court, relying on the plain language of the clause and the bargaining history of the parties, reversed the decision of the National Labor Relations Board (Board)

arbitrate on the basis that doubts over arbitrability "should be resolved in favor of coverage." *Id.* at 376-78, *citing* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). For a discussion of the federal court's ability to issue injunctions in labor disputes, *see* Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970); note 45 *infra*.

24. 414 U.S. at 371-72.

25. *Id.* at 379-80.

26. *Id.* at 380-84.

27. *Id.* at 382.

28. *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 407-08 (1976). *The Buffalo Forge* Court remarked:

> The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of its bargain.

Id. For a discussion of *Buffalo Forge*, *see* notes 41-45 and accompanying text *infra*.

29. *See* notes 19-27 and accompanying text *supra*.

30. *See* notes 31-57 and accompanying text *infra*.

31. 345 U.S. 71 (1953).

32. *Id.* at 79. The collective bargaining agreement of the parties' "provided against strikes, lockouts, other cessation of work or interference therewith except as against a party failing to comply with a decision, award, or order of the Adjustment Board . . . ." *Id.* at 74.

33. *Id.* at 72-73.

and ruled that the no-strike clause was sufficiently inclusive to restrict a sympathy strike.[34]

Subsequent cases, however, have sometimes departed from the view taken in *Rockaway*.[35] In *Mastro Plastics Corp. v. NLRB*,[36] a union charged an employer with unfair labor practices for discharging employees who had struck over the alleged unlawful and discriminatory firing of one of its members for his union activities.[37] The employer's

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34. *Id.* at 79-80. The Board, seeking reinstatement of its original order against the employer, contended that the collective bargaining agreement was of no legal effect because of a deficiency in the contract. *Id.* at 76. The Board maintained that, due to its partial illegality, the contract was null and void altogether and requested that the Court give no effect to the no-strike clause and imply any terms necessary to govern parties' contractual relationship. *Id.* The Court refused the Board's request, preferring instead to sever the excesses of the contract and let the dispute be controlled by the remaining terms which had been collectively bargained for. *Id.* at 79. Thus, the Court gave full effect to the express no-strike clause and went on to cite three reasons why the clause was sufficiently inclusive to restrict a sympathy strike. *Id.* at 79-80. First, the Court noted that the plain meaning of the no-strike clause prohibited any strike, sympathy or otherwise. *Id.* at 79. Second, the bargaining history of the parties revealed that the union had suggested a work stoppage clause which would have read: "No man shall be required to cross a picket line." *Id.* at 79-80. This demand was ultimately rejected by the employer and acquiesced to by the union. *Id.* Finally, the Court stated that the contract made no mention of the union's right to sympathy strike even though many other collective bargaining agreements in the industry did contain such a provision. *Id.*

35. *See, e.g.*, International Union of Operating Engineers, Local 18 v. Davis-McKee, Inc., 238 N.L.R.B. 652 (1978). The National Labor Relations Board has indicated that it rejects *Rockaway* as support for the position that a waiver of the right to sympathy strike may be inferred from general no-strike language. *Id.* at 653. The Board has limited *Rockaway* to its facts, reading the *Rockaway* opinion as implicitly relying on the bargaining history of the parties to infer a waiver. *Id., citing* Keller-Crescent Co., a Div. of Mosler, 217 N.L.R.B. 685, 691 (1975), *enforcement denied,* 538 F.2d 1291 (7th Cir. 1976).

In his concurring opinion in *Davis-McKee,* however, Member Penello objected to the majority's reading of *Rockaway*. 238 N.L.R.B. at 656-57 (Penello, M., concurring). He argued that, in *Rockaway,* while the bargaining history of the parties may have been offered as proof of an intentional relinquishment of the right to sympathy strike, it is not clear that the offer was ever accepted as evidence. *Id.* at 656 (Penello, M., concurring), *citing* NLRB v. Rockaway News Supply Co., 345 U.S. at 80. Additionally, Member Penello noted that the *Rockaway* Court could not have affirmed the judgment of the court of appeals as they did in reliance upon a bare offer of proof, for only "where the record is complete and balanced in its presentation, can an appellate court reverse without remanding." 238 N.L.R.B. at 656 n.26 (Penello, M., concurring), *citing* 10 J. MOORE, FEDERAL PRACTICE § 103.23 (2d ed. 1979). The fact that the court of appeals reversed without remanding and the Supreme Court simply affirmed suggested to Member Penello that neither court relied solely on the bargaining history and that *Rockaway's* impact has not been diminished. 238 N.L.R.B. at 656 (Penello, M., concurring).

36. 350 U.S. 270 (1956).

37. *Id.* at 276. In January 1951, the union initiated proceedings before the Board charging the employer with the commission of unfair labor prac-

affirmative defense was that the express no-strike provision in the collective bargaining agreement amounted to a waiver of the right to strike over any employee grievance, economic or otherwise.[38] The Supreme Court disagreed and, without citing *Rockaway,* held that the broad no-strike provision failed to constitute an agreement by the union not to strike over unfair labor practices,[39] and emphasized that finding a waiver would dilute the protection afforded by the NLRA regarding the employees' right to organize and act as an economic unit.[40] Similarly, in *Buffalo Forge Co. v. United Steelworkers,*[41] the Supreme Court refused to enjoin a sympathy strike pending an arbitrator's decision as to whether the strike violated the express strike prohibition contained in the collective bargaining agreement.[42] The basis of the Court's decision was that section 4 of the Norris-LaGuardia Act[43] acts as a limitation

tices for unlawful discharge of its members for their strike activity. *Id.* The Board ordered the employer to cease and desist from these unlawful practices and reinstate the discharged employees. Mastro Plastic Corp., 103 N.L.R.B. 511 (1953). The court of appeals accepted the Board's findings and enforced the order. NLRB v. Mastro Plastics Corp., 214 F.2d 462 (2d Cir. 1954), *aff'd,* 350 U.S. 270 (1956).

38. 350 U.S. at 277.

39. *Id.* at 281-84. The Court held, over the strong protest of Justice Frankfurter, that the Board and the Second Circuit were correct in their interpretation that the language "any strike" did not preclude strikes protesting unfair labor practices. *Id.* at 281. The Court concluded that when read as a whole, the contract dealt only with the economic relationship between the parties and restricted the meaning of the no-strike clause to strikes over economic matters. *Id.* at 281-84.

40. *Id.* at 281-84. The Court's own language revealed its concern over the unique nature of unfair labor practices. *See id.* at 283. The Court stated that to effectuate the ban on strikes "would eliminate, for the whole year, the employees' right to strike, even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union." *Id.* Indeed, the Court went on to imply that the right to strike over unfair labor practices may be unwaivable. *Id.* In any event, the Court stated that general language banning all strikes was insufficient to prohibit strikes against unfair labor practices which are "unlawful practices destructive of the foundation upon which collective bargaining must rest." *Id.* at 281.

41. 428 U.S. 397 (1976), *aff'g* 517 F.2d 1207 (2d Cir. 1975).

42. 428 U.S. at 404. The collective bargaining agreement provided that "[t]here shall be no strikes, work stoppages or interruption or impeding of work." *Id.* at 399 n.1. The Court noted, however, that the Norris-LaGuardia Act acted as a limitation on its equitable powers, and while it had carved out narrow exceptions to that Act in Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970), *Buffalo Forge* did not fall within the exception and hence the application for injunctive relief was denied. 428 U.S. at 413. For a discussion of the Norris-LaGuardia Act, *see* note 43 *infra.* For a discussion of the relevance of *Boys Market, see* note 15 *infra.*

43. *See* 29 U.S.C. § 104 (1976). Section 4 provides in pertinent part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any per-

upon the Court's power to enjoin a strike over an issue which is, like a sympathy strike,[44] not subject to arbitration.[45]

The courts of appeals have adopted varied postures with regard to the applicability of the doctrine of coterminous interpretation to contracts containing express no-strike provisions.[46] The Seventh Circuit, in *W-I Canteen Services, Inc. v. NLRB*,[47] held that while general lan-

son or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

Id. The policy behind the Act was to "foster the growth and viability of labor unions." Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 252 (1970). Prior to its enactment, strikes and other forms of concerted union activity were usually enjoined, unless the union could justify its means by showing a direct and immediate self-interest. *See, e.g.*, Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900). The requisite self-interest was typically found where union activity was directed at higher wages or better working conditions, but objectives such as the closed shop or unity of organization were not deemed to constitute a sufficient justification. *Id.* at 497, 57 N.E. at 1013. Consequently, Congress passed the Norris-LaGuardia Act which divested federal courts of their injunctive powers in such cases and ensured that activities such as picketing, strikes, and boycotts would be protected regardless of their objective. *See* Note, *Buffalo Forge Co. v. United Steelworkers: The End to the Erosion of the Norris-LaGuardia Act*, 55 N.C. L. REV. 1247, 1249 (1977). Thus, the purpose behind the Act was to improve working conditions through the free play of economic forces. *Id.* The complexity of labor disputes and the need for judicial sensitivity was reflected in the sentiments of Senator Norris when he stated: "It is because we have now on the bench some judges — and undoubtedly we will have others — who lack the judicial poise necessary in passing upon the disputes between labor and capital that [an anti-injunction law] is necessary." 75 CONG. REC. 4510 (1932) (remarks of Sen. Norris). Apparently such an opinion was well founded. Between 1900 and 1927, 118 applications were submitted for federal labor injunctions: 70 were issued ex parte, only 12 of which were supported by affidavits and, during the same period, only 9 injunctions were denied. F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 64 n.8 (1930).

44. *See* note 22 and accompanying text *supra*.

45. 428 U.S. at 404-08. The availability of the federal courts to issue injunctions to enjoin a strike over an issue which is clearly arbitrable represents a judicial exception to the general provisions of the Norris-LaGuardia Act. *See* Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970). In *Boys Markets*, the Supreme Court accommodated § 301 of the NLRA by issuing an injunction to enjoin a strike where the issue underlying the strike was clearly arbitrable. *Id.* at 250-55. For the text of § 301, *see* note 8 *supra*. The basis for the Court's decision to issue the injunction consisted of the policy of enforcement behind § 301 and the congressional preference for voluntary and private settlement mechanisms which flow from the NLRA. *Id.* at 250-55. In *Buffalo Forge*, however, the issue underlying the dispute, a sympathy strike between sister unions and a common employer, was clearly not arbitrable and, hence, did not conform to the narrow exception of *Boys Markets*. 428 U.S. at 407-08.

46. *See* notes 47-57 and accompanying text *infra*.

47. 606 F.2d 738 (7th Cir. 1979). The petitioner sought review of a Board order declaring that petitioner's discharge of employees for engaging in sympathy strikes was an unfair labor practice in violation of the NLRA. W-I Canteen Serv., Inc., 238 N.L.R.B. 609 (1978), *enforcement denied*, 606 F.2d 738 (7th Cir. 1979). The court of appeals declined to enforce the order, finding

guage of a no-strike clause was insufficient, in and of itself, to waive the union's right to wage sympathy strikes,[48] an express picket line clause[49] read in conjunction with the no-strike clause would amount to such a waiver.[50] The court stated that the principle of coterminous interpretation did not apply to express no-strike clauses and that the arbitration and no-strike clauses remained analytically distinct.[51]

The District of Columbia Circuit has held that broad, express no-strike language can embrace a restriction against sympathy striking.[52] In *News Union v. NLRB*,[53] the court expressly rejected the union's contention that language which proscribes any strike should not be read as waiving the right to engage in sympathy strikes.[54]

On the other hand, the First Circuit, in *NLRB v. C.K. Smith & Co.*,[55] held that language which prohibits "any strike" is not tantamount

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that the collective bargaining agreement proscribed strikes of any kind at the employer's premises. 606 F.2d at 749.

48. *Id.* at 745.

49. The controlling picket line clause authorized the union to observe existing picket lines at premises other than the employer's. *Id.* at 745-46. For a discussion of the relationship between a picket line clause and a no-strike clause, *see* note 7 *supra*.

50. 606 F.2d at 745-46. The *W-I Canteen* court noted the broad language of the no-strike clause and the insertion of two picket line clauses, and concluded that, when read as a whole, the agreement indicated that the union had waived its right to engage in a sympathy strike at the employer's premises. *Id.*

51. *Id.* at 744. The court in *W-I Canteen* ruled that coterminous interpretation is merely a rule of contract interpretation and does not preclude the parties from expressing an intent to effectuate the no-strike and arbitration clauses differently. *Id.* In fact, the court found that the language prohibiting work stoppages was indicative of an express intention to extend the no-strike obligation beyond the arbitration clause. *Id.* Additionally, the court rejected a suggestion by the union that it could not forego its right to sympathy strike without specific reference to sympathy strikes in the no-strike clause of the agreement. *Id.* at 745.

52. *See* notes 53-57 and accompanying text *infra*.

53. 393 F.2d 673 (D.C. Cir. 1968). The union petitioned the court to set aside a Board order which had dismissed its complaint against the employer for discharging employees who honored a sympathy strike at the employer's plant. Hearst Corp., Baltimore News Am. Div., 161 N.L.R.B. 1405 (1966). The court of appeals affirmed the order, finding that the union's observance of the picket line was in violation of its collective bargaining agreement. 393 F.2d at 677-78. The relevant portion of that agreement read as follows: "The Union and its members individually and collectively will not, during the term of this Agreement, cause, permit, or take part in any strike, sit down, picketing or other curtailment . . . ." *Id.* at 676-77 n.4.

54. 393 F.2d at 676-78. The union had urged the court to read the language which prohibited "any strike" as not including the right to engage in sympathy strikes. *Id.* The court, however, responded that "the practical relationship between work stoppages and the honoring of picket lines is so well understood in the industrial climate that we think that a clause of this kind using only the word "strike" includes plant suspensions resulting from refusals to report for work across picket lines." *Id.*

55. 569 F.2d 162 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978). The court of appeals enforced an order of the Board requiring the employer to cease and desist from committing unfair labor practices and to reinstate em-

to a clear and unmistakable waiver[56] and that, absent an explicit intention to the contrary, the non-strike and arbitration clauses should be read coterminously so as not to preclude the union's right to engage in sympathy strikes.[57]

Against this background, the Third Circuit considered the scope of the express no-strike provision and arbitration clause contained in Coca-Cola's collective bargaining agreement.[58] The court began with the proposition that the right to engage in sympathy strikes may be waived in a collective bargaining agreement provided that the waiver was clearly and unmistakably established.[59] Consequently, the court noted at the outset that the express no-strike language would not be subject to a liberal interpretation.[60]

Noting the absence of any specific reference to sympathy strikes within the agreement,[61] the court examined the meaning of the prohibition against "any strike."[62] The court looked to precedent and found two sources to support the argument that broad general language was insufficient to act as a waiver of the right to engage in a sympathy strike.[63] First, the Third Circuit found support in *Buffalo Forge* for the extension of the doctrine of coterminous interpretation[64] to express no-strike provisions.[65] The court read *Buffalo Forge,* which declined to enjoin a sympathy strike pending an arbitrator's decision over the legality of the work stoppage,[66] as excluding from the coverage of the no-strike clause any matter which was not subject to arbitration.[67]

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ployees who were discharged for engaging in a sympathy strike at the employer's premises. 569 F.2d at 168-69. *See* C.K. Smith & Co., 95 N.L.R.B. 1617 (1977).

56. 569 F.2d at 168-69. The court relied heavily on its reading of *Mastro Plastics* to limit the scope of the no-strike clause to stoppages over economic issues, which are matters within the collective bargaining agreement. *Id.* at 167. While recognizing that *Mastro Plastics* was distinguishable in that it involved a strike over an unfair labor practice, the court felt that the right to engage in sympathy strikes, protected by § 7 of the NLRA, was equally deserving of judicial protection. *Id.*

57. *Id.* at 168-69.

58. 624 F.2d at 1184-85.

59. *Id.* at 1184, *citing* United Steelworkers v. NLRB, 536 F.2d 550, 555 (3d Cir. 1976).

60. 624 F.2d at 1184.

61. *Id.* at 1184-85.

62. *Id.* at 1185.

63. *Id.*

64. For a discussion of coterminous interpretation, *see* notes 17-28 and accompanying text *supra.*

65. 624 F.2d at 1186. The majority noted that "[t]he relevance of *Buffalo Forge* is the recognition that, absent some evidence to the contrary, the quid pro quo theory underlying coterminous interpretation applies where there is an express no-strike clause in the contract." *Id.* For a discussion of *Buffalo Forge, see* notes 41-45 and accompanying text *supra.*

66. 428 U.S. at 404-08. *See* notes 41-45 and accompanying text *supra.*

67. 624 F.2d at 1186,

Second, the majority read *Mastro Plastics* as support for the position that agreements employing prohibitions against "any strike" fall short of establishing a clear and unmistakable waiver of the right to sympathy strike.[68] Noting that in *Mastro Plastics,* as in the instant case, the contract dealt only with the economic relations of the parties[69] and that in *Buffalo Forge,* the Supreme Court limited the application of the no-strike clause to matters covered by the contract,[70] the Third Circuit concluded that nothing short of explicit language could constitute a waiver of the right to sympathy strike.[71]

The court then examined the extrinsic evidence and found that it too was lacking in sufficient clarity to reveal a waiver.[72] After noting that no evidence of bargaining history was presented in the trial court,[73] the majority focused its analysis on the structure of the contract[74] and the state of the relevant law at the time the contract was made,[75] and

68. *Id.* at 1187. For a discussion of *Mastro Plastics, see* notes 36-40 and accompanying text *supra.*

69. 624 F.2d at 1187, *citing* Mastro Plastics Corp. v. NLRB, 350 U.S. at 281-83.

70. 624 F.2d at 1187, *citing* Buffalo Forge Co. v. United Steelworkers, 428 U.S. at 407-08.

71. 624 F.2d at 1187. *Accord,* NLRB v. C.K. Smith & Co., 569 F.2d at 167.

72. 624 F.2d at 1188-89. *See* notes 73-76 and accompanying text *infra.* For a general discussion of the role of extrinsic evidence in the interpretation of collective-bargaining agreements, *see* notes 13-14 and accompanying text *supra.*

73. 624 F.2d at 1188-89.

74. The majority rejected the district court's finding that the no-strike and arbitration clause were "functionally independent." *Id.* at 1188. The district court had employed this term as a means of portraying the independence between the two clauses and rejecting the quid pro quo theory in regard to express no-strike provisions. *See* 474 F. Supp. at 782-83. The Third Circuit maintained that the phrase "functionally independent" was imprecise, ambiguous, and without precedent. 624 F.2d at 1188. The court's primary criticism of the phrase was that physical separation or lack of cross-reference between the arbitration and no-strike clauses did not amount to a waiver since the normal assumption is that the quid pro quo theory applies — a proposition which was substantiated to the court's satisfaction by its reading of *Buffalo Forge. Id.*

75. The court of appeals also rejected the trial court's finding that case law existing at the time the contract was executed had only utilized the quid pro quo theory where the no-strike and arbitration clauses were tied together. *Id.* at 1188-89. The district court had found that existing case law distinguished broad independent no-strike clauses from more limited dependent clauses. 474 F. Supp. at 782-83, *citing* NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953). For a discussion of *Rockaway, see* notes 31-35 and accompanying text *supra.* The Third Circuit, however, maintained that it found no distinction in case law between dependent and independent clauses and concluded that, under existing case law, there was not evidence of a clear and unmistakeable waiver of the right to sympathy strike. 624 F.2d at 1189. To buttress its position, the court noted that it read *Buffalo Forge* as authority for the quid pro quo theory, even though in that case the Supreme Court had been faced with two seemingly independent clauses. *Id.* at 1188 n.4, *citing* Buffalo Forge Co. v. United Steelworkers, 428 U.S. at 399 n.1. Moreover, the

found that neither was sufficient to act as a waiver of the right to sympathy strike.[76]

In a concurring opinion, Judge Rosenn disagreed with the majority's application of the coterminous interpretation doctrine to the express no-strike provisions.[77] He found no support in *Buffalo Forge* for the majority's position,[78] finding instead, that as an action for injunctive relief, as opposed to damages,[79] *Buffalo Forge* was predicated on the availability of equitable relief under the provisions of the Norris-LaGuardia Act[80]—an issue which had no bearing on the instant case.[81] Thus, Judge Rosenn would have distinguished *Buffalo Forge* and would limit its precedential value to cases involving requests for injunctive relief.[82] Similarly, he distinguished *Mastro Plastics* on the basis that it involved a strike over an unfair labor practice[83]—a right deserving

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Third Circuit noted that the "mere fact that dependent clauses preclude a waiver does not necessarily mean that independent clauses will result in a waiver." 624 F.2d at 1189.

76. 624 F.2d at 1188-91. *See* notes 74 & 75 *supra.*

77. 624 F.2d at 1191-94 (Rosenn, J., concurring). Judge Rosenn would limit the doctrine of coterminous interpretation to implied no-strike obligations. *Id.* at 1194 (Rosenn, J., concurring). While Judge Rosenn took exception to the majority's analysis of coterminous interpretation, he concurred in the result, finding that since the Union had honored a strike over an alleged unfair labor practice by a common employer, the Union's rights were derived from those of the primary strikers and, under *Mastro Plastics,* the right to strike over unfair labor practices must be waived explicitly, if it can be waived at all. *Id.* at 1195-97 (Rosenn, J., concurring). For a discussion of *Mastro Plastics, see* notes 36-40 and accompanying text *supra.* In essence, Judge Rosenn equated the rights of the sympathy strikers with those of the primary strikers where the activity of the latter is aimed at an alleged unfair labor practice committed by a common employer. 624 F.2d at 1195-97 (Rosenn, J., concurring). This is a conclusion which the majority expressly declined to embrace. *See id* at 1187 n.3.

78. 624 F.2d at 1192 (Rosenn, J., concurring). For a discussion of the majority's interpretation of *Buffalo Forge, see* notes 65-67 and accompanying text *supra.*

79. It should be emphasized that Coca-Cola was not seeking injunctive relief — indeed the strike had long ended — but rather was seeking monetary damages from the union. *See* notes 5-9 and accompanying text *supra.*

80. *See* notes 41-45 and accompanying text *supra.*

81. 624 F.2d at 1192-93 (Rosenn, J., concurring).

82. *Id.* at 1193 (Rosenn, J., concurring). In fact, the concurring opinion suggested that *Buffalo Forge* might be inapposite to the majority's position, since it expressly reserved to the arbitrator the determination of whether the strike violated the collective bargaining agreement. *Id.* at 1194 (Rosenn, J., concurring), *citing* Buffalo Forge Co. v. United Steelworkers, 428 U.S. at 410. This reservation suggested to Judge Rosenn that, contrary to the position of the majority, the Supreme Court took no position on the impact of coterminous interpretation on express no-strike provisions. *See* 624 F.2d at 1194 (Rosenn, J., concurring). For a discussion of the majority's statement on the relevance of *Buffalo Forge* to express no-strike provisions, *see* notes 65-67 and accompanying text *supra.*

83. 624 F.2d at 1195-96 (Rosenn, J., concurring). For a discussion of *Mastro Plastics, see* notes 36-40 and accompanying text *supra.* For a discussion of the majority's use of *Mastro Plastics* as authority for the position that

of special protection in order to prevent an employer from insulating his unlawful conduct from concerted union activity.[84] In the view of Judge Rosenn, the argument that general language cannot waive the right to sympathy strike would be limited to strikes over unfair labor practices.[85]

Upon reviewing the Third Circuit's opinion, it is submitted that the court has made a broad extension of the doctrine of coterminous interpretation without case law support. The essence of the court's holding is that broad, general language is insufficient to constitute a waiver of the right to engage in a sympathy strike.[86] To overcome that presumption, a showing must be made, through the use of extrinsic evidence,[87] that the parties intended to agree to a no-strike clause which is broader than the arbitration clause from which it emanated.[88]

The Third Circuit relied on *Mastro Plastics* for its holding that express language prohibiting "any strike" is insufficient to act as a waiver of the right to sympathy strike.[89] *Mastro Plastics,* however, held merely that a broad no-strike clause must yield to the right of a union to protest unfair labor practices.[90] Admittedly, the *Mastro Plastics* Court found the language at issue there to fall short of a waiver,[91] but it did so out of a unique concern that an employer could frustrate collective bargaining by insulating his violations of the NLRA from reprisal by the concerted activities of his employees.[92] It is submitted that the policy considerations surrounding sympathy strikes are simply not as compelling as the concerns in the unfair labor practice situation.[93]

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broad general language of an express no-strike clause is insufficient to constitute a waiver of the right to sympathy strike, *see* notes 68-71 and accompanying text *supra.*

84. *See* 624 F.2d at 1195 (Rosenn, J., concurring). *See also* notes 39-40 and accompanying text *supra.*

85. 624 F.2d at 1195-96 (Rosenn, J., concurring).

86. See 624 F.2d at 1187-88. For a discussion of the court's holding, *see* notes 64-71 and accompanying text *supra.*

87. For a discussion of the court's use of extrinsic evidence, *see* notes 72-76 and accompanying text *supra.*

88. 624 F.2d at 1190-91.

89. For a discussion of the *Coca Cola* court's reading of *Mastro Plastics, see* 624 F.2d at 1187. *See also* notes 36-40 & 68-71 and accompanying text *supra.*

90. *See* 350 U.S. at 281-84.

91. *See id.*

92. *See id.* at 283. *See also* notes 39-40 and accompanying text *supra.*

93. For a discussion of the policy of the NLRA in affording protection to sympathy strikers, *see* note 11 *supra.* For a discussion of why courts will not apply a literal interpretation to a broad no-strike clause to preclude a strike over an unfair labor practice, *see* note 40 and accompanying text *supra.* It is submitted that the underlying concern of the Third Circuit in the instant case is that, without benefit of the right to sympathy strike, the Union is left without a remedy since, by definition, the dispute resulting in a sympathy strike is not between the sympathy strikers and their employer and, consequently, is not subject to arbitration or other forms of administrative redress. *See* note 28 and accompanying text *supra.*

It is further submitted that while a literal interpretation of the no-strike clause with regard to unfair labor practices will undermine the policies of the NLRA,[94] such an interpretation in regard to sympathy strikes will enhance the process of collective bargaining by assuring the employer that the terms of the clause will be given vitality and meaning. It is suggested that any concern for affording the employer the benefits of his bargain is conspicuously absent from the court's analysis, as is any consistent application of the case law which is both inapposite to the court's result and supportive of the employer's right to enforce a broad no-strike clause as a measure of what the parties bargained for.[95]

While coterminous interpretation has beome a fixture in cases recognizing no-strike obligations by implication,[96] it is submitted that its application to express no-strike provisions is without support in case law. While cases such as *Lincoln Mills*[97] and *Local 174, International Brotherhood of Teamsters v. Lucas Flour Co.*,[98] have suggested that a no-strike obligation, express or implied, is the quid pro quo for the presence of an arbitration clause,[99] the language used by the Court may have been unduly broad, because, as the issue in those cases was whether the Court could *imply* the no-strike obligation, the language relating to express provisions was merely dictum.[100]

94. *See* note 40 and accompanying text *supra*.

95. *See, e.g.*, NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953); W-I Canteen Serv., Inc. v. NLRB, 606 F.2d 738 (7th Cir. 1979); News Union v. NLRB, 393 F.2d 673 (D.C. Cir. 1968). The Third Circuit does pay cursory attention to two of these cases which were offered by the employer as support for effectuating a broad no-strike clause. *See* 624 F.2d at 1185 n.1, 1188. The court utilizes *Rockaway* as an illustration of the impact of bargaining history on contract interpretation. *See id.* at 1188. At least impliedly, therefore, the court has asserted that the no-strike provision in *Rockaway* was given deference because it was consistent with a showing of the bargaining history of the parties. *See id.* This reading of *Rockaway* has not been universally accepted and has been the subject of much debate both within the courts and the Board. *See* note 35 and accompanying text *supra*. The importance of *Rockaway* cannot be overstated since it represents the only Supreme Court opinion on point. Similarly, the majority distinguished *W-I Canteen* on the basis of two picket line clauses which had been relied upon by the Seventh Circuit in reaching its conclusion that the union had waived its sympathy strike rights. 624 F.2d at 1185 n.1. The Third Circuit noted that in the instant case the absence of a picket line clause was not determinative, since such a clause could have been used to either relinquish or support the Union's right to observe existing picket lines. *Id.*

96. *See, e.g.*, Gateway Coal Co. v. UMW, 414 U.S. 368 (1974); Local 174 Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). For a discussion of these cases, *see* notes 19-27 and accompanying text *supra*.

97. For a discussion of *Lincoln Mills, see* notes 19-22 and accompanying text *supra*.

98. 369 U.S. 95 (1962). For a discussion of *Lucas Flour, see* note 17 *supra*.

99. *See* note 22 and accompanying text *supra*.

100. 624 F.2d at 1191-92 (Rosenn, J., concurring); International Union of Operating Engineers, Local 18 v. Davis-McKee, Inc., 238 N.L.R.B. 652, 658-59 (1978) (Penello, M., concurring).

In addition, it is submitted that the court's reliance on *Buffalo Forge* as authority for its extension of the doctrine of coterminous interpretation is misplaced. As Judge Rosenn [101] and others have noted,[102] the thrust of *Buffalo Forge* was its analysis of the effect of the Norris-LaGuardia Act on the Court's injunctive powers [103]—an analysis inapplicable in the instant case since that Act governs only the court's equitable powers.[104] Indeed, the *Buffalo Forge* Court never reached the issue of whether damages were available [105] or whether the sympathy strike was legal.[106] Thus, it is submitted that the case can hardly stand, as the majority suggests, for an express sanction of the use of the doctrine of coterminous interpretation to control broad general language prohibiting strikes.[107] Instead, it is submitted that, as Judge Rosenn suggests, the opinion should be limited to the context of the relief requested, specifically, an injunction.[108]

Indeed, it is submitted that application of the Third Circuit's version of *Mastro Plastics* and *Buffalo Forge* may produce incongruous results. As already noted, in the absence of any no-strike provision it

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101. *See* 624 F.2d at 1192-94 (Rosenn, J., concurring). For a discussion of Judge Rosenn's interpretation of *Buffalo Forge, see* notes 78-82 and accompanying text *supra.*

102. *See* International Union of Operating Engineers, Local 18 v. Davis-McKee, Inc., 238 N.L.R.B. 652, 659-60 (1978) (Penello, M., concurring).

103. *See* 428 U.S. at 410-12. For a discussion of the holding of *Buffalo Forge, see* notes 41-45 and accompanying text *supra.*

104. *See* note 43 *supra.*

105. *See* 428 U.S. at 399.

106. *Id.* at 410. The *Buffalo Forge* opinion suggested more than once that it neither decided whether the sympathy strike was legal nor necessarily endorsed the Third Circuit's extension of the doctrine of coterminous interpretation. *Id.* First, the Court was careful to note that the legality of the strike was not at issue and was within the purview of the arbitrator. *Id.* This fact has led at least one commentator to state boldly that:

> Although prearbitration injunctive relief against the sympathy strike was not ordered, the majority ruled that the dispute over the scope of the no-strike clause was arbitrable. Thus the Court left the arbitrator free to construe the no-strike clause as prohibiting sympathy strikes, even though the dispute that caused the sympathy work stoppage was not arbitrable . . . . [T]his suggests that, unless the agreement specifically so provides, an otherwise unrestricted express no-strike clause should not be construed as coextensive with the scope of the grievance-arbitration provisions when the disputed issue concerns the permissibility of a sympathy work stoppage.

Smith, *The Supreme Court,* Boys Markets, *Labor Injunctions,* and *Sympathy Work Stoppages,* 44 U. CHI. L. REV. 321, 356-57 (1977). *But see* International Union of Operating Engineers, Local 18 v. Davis-McKee, Inc., 238 N.L.R.B. 652, 654 n.10 (1978) (the function of the courts are limited, and it would not be proper for the Court to comment on the impropriety of the strike where the issue is left to the arbitrator).

107. *See* 624 F.2d at 1186. *See also* notes 64-71 and accompanying text *supra.*

108. *See* 624 F.2d at 1193 (Rosenn, J., concurring). *See also* note 82 and accompanying text *supra.*

is well-settled that the union waives its right to strike over arbitrable issues.[109] Under the court's holding, however, the insertion of an *express* no-strike provision achieves precisely the same result.[110] Thus, it is submitted that the court has effectively stripped the express no-strike clause from the contract, making it devoid of any meaning, and depriving the employer of his bargain. The presence of a superfluous clause is hardly a result which was likely to be intended by experienced negotiators,[111] and certainly a construction contrary to the basic tenets of contract interpretation.[112]

In addition, it is submitted that, from a policy standpoint, it is unsound to endorse the construction of the majority which places a greater emphasis on securing a union's right to strike over disputes to which it is not a party than over its own grievances. Assuming that an employee's own economic conditions of employment are of paramount concern,[113] it is submitted that courts should carefully avoid any decision which, through implication of contractual terms, elevates an employee's right

109. *See* notes 17-27 and accompanying text *supra.*

110. *See* note 67 and accompanying text *supra.*

111. The court would allow its presumption of coterminous interpretation to be overcome upon a showing of extrinsic evidence that the parties intended otherwise. *See* 624 F.2d at 1188. As already mentioned, a primary consideration in that determination is whether the relevant case law, existing at the time the contract was made, is indicative of the parties' intent. *Id.* at 1184. *See* note 14 and accompanying text *supra.* By 1976, when the contract was executed, coterminous interpretation was firmly established in the areas of implied no-strike obligations. *See* note 96 and accompanying text *supra.* It thus seems logical to deduce that by inserting an express no-strike clause, the parties intended to conceive of a no-strike clause broader than the arbitration clause. Such a conclusion is not only logical in that it renders the provision meaningful, but is supported by empirical evidence as well. *See* Feller, *supra* note 17, at 757-60. A recent study of data taken from the Department of Labor shows that nearly half of the no-strike provisions analyzed by the Bureau of Labor Statistics were *absolute* bans, causing one author to comment that "the no-strike provisions of most collective agreements constitute a *quo* considerably in excess of the *quid* of the agreement to arbitrate." *Id.* These results clearly contradict the court's opinion that "in the normal case the union will not agree to a no-strike clause that extends beyond the arbitration clause." 624 F.2d at 1186.

112. *See* RESTATEMENT (SECOND) OF CONTRACTS § 229(a) (1973). Section 229(a) provides in pertinent part: "An interpretation which gives a reasonable, lawful, and *effective* meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, lawful, or of no effect." *Id.* (emphasis added). In the comment to § 229(a), it is observed that:

> Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous. . . . But, particularly, in cases of integrated agreements, terms are rarely agreed to without reason. Where an integrated agreement has been negotiated with care and in detail and has been expertly drafted for the particular transaction, an interpretation is very strongly negated if it would render some provisions superfluous.

Id. comment.

113. *See* Local 12419, Int'l Union of Dist. 50 UMW (National Grinding Wheel), 176 N.L.R.B. 628, 630 (1969).

to obesrve another Union's picket line above and beyond the right to strike over its primary disputes. This was exactly the point that the Board made when it reasoned that "an employee who ceases work in deference to another's picket line, though he enjoys the same protection as if he engages in a strike of his own, enjoys no higher protection either." [114]

In conclusion, it is submitted that the Third Circuit's wholesale application of the doctrine of coterminous interpretation to agreements containing express no-strike provisions is inconsistent with prior use of the doctrine as a rule of contract interpretation.[115] It is further submitted that its extension of coterminous interpretation is without case law support [116] or sound policy reasoning,[117] and effectively operates to deprive the employer of his bargain.[118] The result will surely be greater specificity and clarity in collective bargaining agreements—and there lies the real, if only, virtue of the Third Circuit's decision.

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114. *Id.*
115. *See* notes 17-27 & 95 and accompanying text *supra.*
116. *See* notes 96-108 and accompanying text *supra.*
117. *See* notes 109-14 and accompanying text *supra.*
118. *See* notes 109-12 and accompanying text *supra.*

LABOR LAW — FAIR LABOR STANDARDS ACT (FLSA) — STATUS OF HIGH-SALARIED MANAGERIAL EMPLOYEES WHO LOSE THEIR EXEMPTION FROM THE OVERTIME PROVISIONS OF THE FLSA IS NOT TO BE MEASURED BY THE WORKWEEK STANDARD.

Marshall v. Western Union Telegraph Co. (1980)

The plaintiff, the Secretary of Labor (Secretary), initiated an action in the United States District Court for the District of New Jersey[1] seeking to compel the defendant employer, Western Union Telegraph Co. (Western Union), to make overtime payments to managerial employees who performed rank and file work during a prolonged strike.[2] Under the Fair Labor Standards Act (FLSA or Act),[3] managerial employees are normally exempt from the requirement that an employer pay an overtime premium.[4] The Secretary, however, contended that this exempt status could be lost through the performance of non-exempt work

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1. Marshall v. Western Union Tel. Co., 621 F.2d 1246 (3d Cir. 1980). The Secretary of Labor initiated this action to enforce the provisions of the Fair Labor Standards Act (FLSA or Act) pursuant to § 11 of the Act, which provides that the Secretary may bring all actions to restrain violations of its provisions. *See* 29 U.S.C. § 211 (1976).

Section 17 of the FLSA provides that the United States District Courts shall have jurisdiction to entertain suits brought to restrain violations of the Act. *See id.* § 217 (describing injunction proceedings).

2. Brennan v. Western Union Tel. Co., 561 F.2d 477, 478 (3d Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978) (prior opinion). For a discussion of *Brennan, see* notes 6-8 & 42-51 and accompanying text *infra.* On June 1, 1971, Western Union's employees, represented by the United Telegraph Workers and the Communications Workers of America, went out on strike. 561 F.2d at 478. The membership of the United Telegraph Workers returned to work on July 7, 1971 but the Communications Workers remained on strike through September 12, 1971. *Id.* In order to maintain certain necessary communications services — such as those essential to national defense — Western Union assigned approximately 2,100 managerial employees to perform the work normally done by the striking union members. *Id.* The parties stipulated that some of the managerial employees devoted more than 50% of their time during the strike to clerical, technical, maintenance, and operational tasks normally performed by the striking rank and file employees. *Id.* at 479.

3. 29 U.S.C. §§ 201-219 (1976) (originally enacted as the Fair Labor Standards Act of June 25, 1938, Pub. L. No. 75-718, 52 Stat. 1060).

4. *See* 29 U.S.C. §§ 206-219 (1976). Section 6 of the FLSA contains minimum wage provisions. *Id.* § 206. Section 7 prescribes maximum permissible hours and also contains the requirement that an employer pay time-and-one-half overtime. *Id.* § 207. Section 13(a)(1) contains an exemption from §§ 6 and 7 for employees who meet the standard for classification as managerial employees. *Id.* § 213(a)(1). For the text and a discussion of § 7, *see* note 14 and accompanying text *infra.*

during a strike.[5] In *Brennan v. Western Union Telegraph Co.*,[6] the United States Court of Appeals for the Third Circuit had held that administrative, executive and professional employees who perform the functions of non-exempt employees during a strike could lose their exempt status,[7] but remanded the case to the district court for a determination of the standard by which an employee's exempt status as a managerial employee was to be measured.[8] On remand, the district court accepted the Secretary's interpretation that the "workweek" standard was the yardstick by which to determine managerial exemptions.[9] Western Union appealed from the application of this standard as it related to high-salaried managerial employees whose exempt status is defined by the so-called short test of the Code of Federal Regulations.[10] On appeal, the Third Circuit[11] reversed, *holding* that the Secretary's proffered workweek standard could not be applied to high-salaried managerial employees since the acceptance of any particular time frame to measure the loss of a managerial employee's exemption from the overtime requirement of the FLSA would involve the court in administrative rulemaking. *Marshall v. Western Union Telegraph Co.*, 621 F.2d 1246 (3d Cir. 1980).

5. Brennan v. Western Union Tel. Co., 561 F.2d 477, 480-81 (3d Cir. 1977), *cert. denied*, 434 U.S. 1068 (1978).

6. 561 F.2d 477 (3d Cir. 1977), *cert. denied*, 434 U.S. 1068 (1978). Marshall represents the appeal of the district court's order in response to the Third Circuit's holding in *Brennan*.

7. 561 F.2d at 484. The district court held that the loss of exempt status applied to administrative and professional employees only, and that executives were to be treated differently under the "emergencies" provision of the regulations. Dunlop v. Western Union Tel. Co., 78 Lab. Cas. ¶ 33,340 (D.N.J. Jan. 28, 1976) (For the emergencies provision, *see* 29 C.F.R. § 541.109 (1979). The *Brennan* court, however, did not reach this issue because Western Union disclaimed reliance on the "emergencies" provision. 561 F.2d at 484. Therefore, the appellate court affirmed the holding of the district court as to the administrative and professional employees and reversed as to the executives. *Id.* The court then continued to treat all three classes as "managerial employees." *Id.* For a further discussion of *Brennan*, *see* notes 42-51 and accompanying text *infra*.

8. 561 F.2d at 483. The court noted that important questions involving the application of the regulations were still left open: "For example, the district court has not yet specifically decided if, under the regulations, the determination of whether an employee is 'employed in a bona fide executive . . . capacity' is to be made with respect to each workweek separately or with respect to a broader period of time." *Id.*, *quoting* 29 U.S.C. § 213(a)(1) (1976) (omission by the court).

9. Marshall v. Western Union Tel. Co., No. 79-1695, slip op. at 18 (D.N.J. Jan. 29, 1979), *rev'd*, 621 F.2d 1246 (3d Cir. 1980). For a discussion of the workweek standard, *see* notes 57-61 and accompanying text *infra*.

10. Marshall v. Western Union Tel. Co., 621 F.2d at 1249. *See* 29 C.F.R. § 541.1(f) (1979) (executives); *id.* § 541.2(e) (administrators); *id.* § 541.3(a) (professionals). For a discussion of these regulations, *see* notes 30-38 and accompanying text *infra*.

11. The case was heard by Judges Garth, Gibbons, and Rosenn. Judge Rosenn wrote the opinion of the court. It should be noted that Chief Judge Seitz and Judges Aldisert and Hunter decided *Brennan*. Chief Judge Seitz wrote the opinion in that case and Judge Hunter concurred in a separate opinion. *See* 561 F.2d at 477.

The FLSA was enacted in 1939 as a remedial act with the avowed purpose of alleviating conditions which were detrimental to the maintenance of a minimum standard of living necessary for the health, efficiency, and well-being of workers engaged in the production of goods for interstate commerce.[12] To achieve this end, Congress included in the FLSA provisions which place a floor under wages [13] and a ceiling on hours.[14] Congress also required that overtime payments be made to employees who work more than forty hours in any workweek.[15] Specifically exempted from the Act's overtime requirement are those managerial employees who are employed in a "bona fide executive, administrative or professional capacity." [16] The terms executive, administrative

12. *See* 29 U.S.C. § 202 (1976). In order to achieve these goals, the FLSA represents "a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act." United States v. Darby, 312 U.S. 100, 109 (1941).

In urging Congress to accept the FLSA, President Roosevelt said:

> The overwhelming majority of our population earns its daily bread either in agriculture or in industry. One-third of our population, the overwhelming majority of which is in agriculture or industry, is ill-nourished, ill-clad, and ill-housed. . . . Our Nation, so richly endowed with a capable and industrious population, should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. A self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' hours. . . . As we move resolutely to extend frontiers of social progress, we must be guided by practical reason and not barren formula. We must ever bear in mind that our objective is to improve and not impair the standard of living of those who are now undernourished, poorly clad, and ill-housed.

81 CONG. REC. 4983-84 (1937).

13. *See* 29 U.S.C. § 206 (1976) (minimum wage).

14. *See* 29 U.S.C. § 207 (1976). Section 7 provides in pertinent part:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Id.

See generally Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460 (1947) (FLSA to compensate for wear and tear of workweek in excess of 40 hours); Southland Gasoline Co. v. Bayley, 319 U.S. 44, 45 & n.2 (1943) (FLSA to limit hours); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-78 (1942) (limitation on hours to distribute employment opportunities); White v. Witwer Grocer Co., 132 F.2d 108, 110 (8th Cir. 1942) (intention of FLSA is to set a floor under wages and a ceiling over hours).

15. 29 U.S.C. § 207 (1976). For the text of § 7, *see* note 14 *supra.*

16. 29 U.S.C. § 213 (1976). Section 13 provides in pertinent part:

> (a) The provisions of sections 6 . . . and 7 of this title shall not apply with respect to —

and professional employee are defined and delimited by the Secretary through the promulgation of regulations.[17]

The promulgation of regulations by the Secretary must be in accordance with the provisions of the Administrative Procedure Act (APA).[18] However, the APA explicitly excludes from its notice and comment provisions interpretive rules or statements of agency policy.[19] When the interpretation of an administrative regulation is at issue, the courts look to the administrative agency's construction.[20] It has been stated that the "ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." [21]

The courts may, however, find that an agency's purported interpretive regulation is in fact legislative,[22] and therefore subject to the notice and comment requirements of the APA.[23] Failure to adhere to the APA provisions renders an improperly enacted legislative regulation

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(1) Any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act. . .).

Id. § 213(a) (1).

17. *See* 29 U.S.C. § 213(a)(1) (1976). The definitions provided by the Secretary are published in the Federal Register, are subsequently compiled in the Code of Federal Regulations, and are to be judicially noticed. *See* 44 U.S.C. §§ 1505, 1507, 1510 (1976).

18. 5 U.S.C. § 551-559 (1976). The APA requires that the agency give notice of a proposed rulemaking unless the rules are "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or . . . when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. *Id.* §§ 553(b)(3)(A)-(B). After notice has been given, the agency must allow interested persons to participate in the rulemaking through the submission of written commentary. *Id.* § 553(C).

19. *Id.* § 553(b)(3)(A) (1976). For a discussion of the meaning of "interpretive rules," *see* note 29 *infra.*

20. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945). In *Bowles,* the Court stated that where agency interpretation of a regulation is involved "a court must necessarily look at the administrative construction of the regulation if the meaning of the words used is in doubt." *Id.*

21. *Id.* at 414. In the *Bowles* case, the Supreme Court addressed the issue of the weight to be given an administrative interpretation of a regulation. *Id.* at 413-14. The controlling weight to be accorded administrative interpretive rulings was further clarified when the Supreme Court contrasted the standards of deference to administrative interpretations of statutes and interpretations of regulations. *See* Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (deference clearly in order where administrative regulation was in issue).

22. *See* Batterton v. Francis, 432 U.S. 416, 424-26 & n.9 (1977). In *Batterton,* the Court noted that where Congress has entrusted an agency with the responsibility of defining a statutory term, the definitional regulations are adopted with legislative effect. *Id.* at 425. Regulations adopted through a legislative power, if enacted in compliance with the rulemaking procedures of the APA, can be overturned by the courts only if the regulation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 706 (2)(A), (C) (1976).

23. *See* 5 U.S.C. § 553 (1976) (provisions applicable to all rulemaking; exceptions limited). For a discussion of § 553, *see* note 18 *supra.*

invalid.[24] The determination of whether an agency's interpretive rule is in fact legislative has been made in several ways.[25] Some courts have looked to the practical effect of the rule and, if the rule substantially affects legal rights, the courts conclude that the rule is legislative.[26] Another approach is to accept the agency's characterization of the rule as interpretive or legislative if the agency has been delegated the power to legislate rules.[27] If the rule is characterized as legislative, it must have been enacted in compliance with the APA provisions; [28] if the rule is characterized as interpretive, the court is free to substitute its own interpretation, but only if construction propounded by the agency is plainly erroneous or inconsistent with the regulation which it interprets.[29]

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24. *See* 5 U.S.C. § 706(2)(D) (1976) (courts shall set aside agency action found to be without observance of procedure required by law). Noting that the purpose of the APA notice and comment provisions is to assure fairness and mature consideration of rules of general application, the Supreme Court has refused to let stand improperly promulgated rules. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764, 766 (1968).

25. *See* notes 26-29 and accompanying text *infra.*

26. This method has been termed the "substantial impact" test. *See* Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements,* 75 MICH. L. REV. 521, 523 (1977); Koch, *Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy,* 64 GEO. L.J. 1047, 1061 (1976).

The substantial impact test has been followed in most circuits. *See* Stoddard Lumber Co. v. Marshall, 627 F.2d 984, 986-87 (9th Cir. 1980); Brown Express, Inc. v. United States, 607 F.2d 695, 701-07 (5th Cir. 1979); Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 669 (4th Cir.), *cert. denied,* 435 U.S. 995 (1978); Detroit Edison Co. v. EPA, 496 F.2d 244, 248-49 (6th Cir. 1974); Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 481-82 (2d Cir. 1972). The substantial impact test, however, is not without its critics. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:15, at 69-76 (2d ed. 1979).

27. This test has been called the "legal effect" test. *See* Asimow, *supra* note 26, at 523. The legal effect test thus addresses two issues: 1) the degree of binding force that a regulation has on the courts; and 2) the procedure required for proper issuance of the rule. *See* 2 K. DAVIS, *supra* note 26, § 7.15, at 76.

The legal effect test was adopted by the Third Circuit for determining the legality of an agency's interpretive ruling. *See* Cerro Metal Prods. v. Marshall, 620 F.2d 964, 981-82 & nn.45-47 (3d Cir. 1980), *noted in* The Third Circuit Review, 26 VILL. L. REV. 861 (1981); Daughters of Miriam Center for the Aged v. Matthews, 590 F.2d 1250, 1255 n.9, 1258-59 (3d Cir. 1978).

28. For a discussion of the requirements of compliance with the notice and comment provisions of the APA when an agency exercises a congressionally delegated legislative function, *see* notes 18-19 and accompanying text *supra.*

29. Cerro Metal Prods. v. Marshall, 620 F.2d 964, 981-82 & nn.45-47 (3d Cir. 1980). In *Cerro,* the court noted that the major distinction between legislative and interpretive rulings is not the nature of the questions they address but the authority and intent with which the rules are issued. *Id.* at 981. It is submitted, therefore, that any rule which is not enacted pursuant to the APA provisions must be intended as an interpretive ruling. The courts are bound by an agency's interpretive ruling to the extent that the interpretation is of controlling weight unless it is plainly erroneous or inconsistent with the regulation it interprets. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945); notes 20-21 and accompanying text *supra.*

The interpretive regulations promulgated under the authority of the FLSA provide a long test and a short test for determining whether an employee is employed in a managerial capacity,[30] and is thus normally exempt from the FLSA's overtime pay provisions.[31] The guidelines presented by these tests are formed by combining the requirement that the employee perform certain duties with specific minimum weekly salary levels.[32]

The long test provisions provide for the lower salary level of the two tests [33] but the job description is quite detailed.[34] Furthermore, to qualify as a managerial employee under the long test an employee may devote no less than eighty percent of his working hours during the work-

30. The Code of Federal Regulations contains different regulations for executives, administrators and professionals. *See* 29 C.F.R. § 541.1 (1980) (executives); *id.* § 541.2 (administrators); *id.* § 541.3 (professionals). The regulations are substantially the same. *See id.* Discussion of all three classes will be grouped under the category of managerial employees. For the text of the regulation defining "bona fide executive," *see* note 32 *infra.*

31. *See* 29 C.F.R. §§ 541.1-541.3 (1980). In all three regulations, the proviso of the final paragraph contains the short test provision, which is a substitute for the long test contained in the rest of the regulation. *See id.* For the text of the regulation defining executive status, *see* note 32 *infra.*

32. The provision containing the test for executive status provides:

> The term "employed in a bona fide executive . . . capacity" in section 13(a)(1) of the act shall mean any employee:
>
> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of [*sic*] subdivision thereof; and
>
> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees [or whose recommendation, as to hiring, firing or promoting will be given particular weight]; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent . . . of his hours of work in the work-week to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section . . . ; and
>
> (f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week . . . ; *Provided,* that an employee who is compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more employees therein shall be deemed to meet all the requirements of this section.

29 C.F.R. § 541.1(a)-(f) (1980).

33. *Compare id.* § 541.1 (f) (long test salary level of $155) *with id.* § 541.1(f) (proviso) (short test salary level of $250 per week).

34. *See id.* § 541.1(a)-(d) (1980). For the text of the regulation, *see* note 32 *supra.*

week to the managerial duties specified within the other long test provisions.[35]

The short test applies to high-salaried employees,[36] and the corresponding duties are much more broadly defined than in the long test.[37] To qualify as a managerial employee under the short test, an employee's "primary duty" must be management and he must customarily and regularly direct the work of other employees.[38]

When determining whether an employee is covered by the protective provisions of the FLSA, the exemptions are narrowly construed

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35. 29 C.F.R. § 541.1 (e) (1980). For the text of the regulation, *see* note 32 *supra.*

36. *See* 29 C.F.R. § 541.1(f) (1980) (proviso). The salary level of "high-salaried" executives is $250 per week. *Id.* The short test salary figure is the same for executive, administrative, and professional employees. *See id.* §§ 541.1(f), 541.2(e)(2), 541.3(e).

37. *Compare id.* § 541.1(a)-(d) *with id.* § 541.1(f) (1980) (proviso). For the text of the regulation, *see* note 32 *supra.* For a discussion of the meaning of the duties of a high-salaried managerial employee, *see* note 38 and accompanying text *infra.*

38. 29 C.F.R. § 541.1(f) (1980) (proviso). The regulations provide a definition of the term "primary duty." *Id.* § 541.103. Section 541.103 provides in pertinent part:

> A determination of whether an employee has management as his primary duty must be based on all the facts of a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the empoyee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of non-exempt work performed by the supervisor.

Id.

Judicial application of the regulation defining primary duty has not limited its meaning to a specific time period. *See, e.g.,* Wainscoat v. Reynolds Elec. & Engr. Co., 471 F.2d 1157, 1158 (9th Cir. 1973); Topel v. Northern Va. Sun, Inc., 77 Lab. Cas. ¶ 33,274 (E.D. Va. 1973), *aff'd mem.,* 77 Lab. Cas. ¶ 33,275 (4th Cir. 1975). In *Wainscoat,* the court denied the workers' overtime claim and noted that "the major portion of their time was spent in exempt functions." 471 F.2d at 1162. In applying the short test criteria, the court made no mention of a workweek standard, despite the fact that appellant's claims were for "work in excess of forty hours per week during various monthly periods." *Id.* at 1158.

Similarly, overtime compensation was denied a plaintiff, although he may have spent more than 50% of his time in non-managerial duties, because his "primary duty during his employment consisted of . . . management. . . ." Topel v. Northern Va. Sun, Inc., 77 Lab. Cas. ¶ 33,274, at 47,071.

against the employer seeking to assert them.[39] In this context, many courts have refused to find that employees are managerial where their title or job description merely allows their employers to demand burdensome workweeks without compensating the employees in accordance with the overtime requirements of the FLSA.[40]

Against this background, the Third Circuit in *Marshall* was presented with the question of whether, under the standard of judicial review for interpretive administrative rulings, the workweek was the proper time frame for determining whether high-salaried managerial employees would lose their exemption from the FLSA's overtime provisions.[41]

As a preface to a discussion of the specific issue before it, the court reviewed its holding in *Brennan*,[42] in which the Secretary had argued that the policy of compensating workers for a burdensome workweek applied with respect to each distinct workweek.[43] The *Brennan* court had acceded to this view, finding that such a conclusion was within the Secretary's discretion.[44] Furthermore, the *Brennan* court had stated that the overtime requirement of the FLSA applies to "any" employee who works over forty hours during a workweek.[45] The court had placed the burden on Western Union to show that this did not apply to managerial employees doing strike work.[46] Finally, in considering the

39. *See, e.g.*, Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) (exemption from humanitarian legislation must be narrowly construed); Arnold v. Ben Kanowski, Inc., 361 U.S. 388, 392 (1960) (exemptions narrowly construed against employers seeking to assert them).

40. *See generally* Annot., 40 A.L.R.2d 332 (1955 & Supp. 1980). *See also* Hodgson v. Cactus Craft, 481 F.2d 464, 466 (9th Cir. 1973) (title of supervisor and ability to hire and fire employees not equivalent to executive status); Mitchell v. Williams, 420 F.2d 67 (8th Cir. 1969) (employee who worked as embalmer, ambulance driver, funeral director and general manager not exempt); Wirtz v. Bledsoe, 365 F.2d 277, 279 (10th Cir. 1966) (employee who supervised the work of other employees but also did physical work not exempt). *But see* McReynolds v. Pocahontas Corp., 192 F.2d 301, 303 (4th Cir. 1951) (exempt employee doing non-exempt work during a strike does not lose exempt status).

41. 621 F.2d at 1248.

42. *Id.* at 1248-49, *citing* Brennan v. Western Tel. Co., 561 F.2d 477 (3d Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978). *See* note 6 *supra*.

43. 561 F.2d at 481.

44. *Id.* at 480-81. The *Brennan* court noted the references in the text of § 7 of the FLSA, which refers to "any" workweek. *Id.*, *citing* 29 U.S.C. § 207(a)(1) (1976). For the text of this section, *see* note 14 *supra*. The *Brennan* court also noted the general rule that an agency's interpretation of its own governing statute is accorded deference. 561 F.2d at 482, *citing* Batterton v. Francis, 432 U.S. 416, 424-25 (1977). For a discussion of *Batterton*, *see* note 22 *supra*. The *Brennan* court then cited the Supreme Court for the proposition that one intended result of the FLSA was to compensate all workers who worked a burdensome workweek. 561 F.2d at 482, *citing* Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-78 (1942).

45. 561 F.2d at 483. The court was apparently referring once again to § 7 of the FLSA. *See* note 44 *supra*. For the text of § 7, *see* note 14 *supra*.

46. 561 F.2d at 483. This burden fell on Western Union, apparently through application of the general rule that exemptions from the FLSA are

regulations defining managerial employees,[47] the *Brennan* court had agreed with the Secretary that the exemptions did not "universally exclude all managerial personnel who perform strike duty."[48] The *Brennan* court had noted that an agency's explication of its regulation is controlling if reasonable[49] and held that managerial personnel who perform strike duty are not necessarily exempt from the FLSA's overtime provisions.[50] Judge Hunter added, in a concurring opinion, that the district court should not be misled by the majority's apparent acceptance of the workweek standard and noted that the short test provisions might not be suited to application on a week-to-week basis.[51]

On remand, the district court accepted the workweek as the standard by which to determine whether a managerial employee performed primarily exempt managerial work or nonexempt rank and file work,[52] since Western Union had failed to show that it was plainly erroneous or inconsistent with the regulation.[53]

On appeal by Western Union, the *Marshall* court applied two distinct approaches in considering whether the district court's adoption of the workweek standard was appropriate.[54] First, the court examined

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narrowly construed against the employer asserting them. *See* note 39 and accompanying text *supra*.

47. For a discussion of the regulations, *see* notes 30-38 and accompanying text *supra*.

48. 561 F.2d at 483.

49. *Id., citing* Lucas Coal Co. v. Interior Bd. of Mine Operations Appeals, 522 F.2d 581, 584 (3d Cir. 1975).

In *Lucas*, the court noted that the "interpretation of an administrative regulation . . . may not be set aside unless such ruling is plainly erroneous or inconsistent with the regulations." *Id.* at 584, *citing* Udall v. Tallman, 380 U.S. 1, 16 (1965). For a discussion of *Udall v. Tallman, see* note 21 and accompanying text *supra*.

50. 561 F.2d at 483. The *Brennan* court remanded the case to the district court for a determination of, inter alia, whether status as a managerial employee was to be determined with respect to each workweek separately or with respect to a broader period of time. *Id.* The *Brennan* court had declined to address questions of the detailed application of the regulations since these were for the district court to determine on remand. *Id.* at 483 & n.10.

51. *Id.* at 484-45 & n.1 (Hunter, J., concurring).

52. Marshall v. Western Union Tel. Co., No. 79-1165, slip op. at 3-4 (D.N.J. Jan. 21, 1979). *See also* 621 F.2d at 1249 (summary of district court holding).

53. Marshall v. Western Union Tel. Co., No. 79-1165, slip op. at 14 (D.N.J. Jan. 21, 1979). Noting that the question was a close one, Judge Lacey determined that the application of the workweek standard could not be termed "unreasonable or plainly erroneous." *Id.* slip op. at 18. Judge Lacey declined to follow the path suggested by Judge Hunter's concurrence in *Brennan*. *Id.* Judge Hunter had suggested that the workweek standard might in fact be inconsistent with the regulations and noted that the court need not accept an inconsistent interpretation. *See* 561 F.2d at 484-85 & n.1 (Hunter, J., concurring).

54. 621 F.2d at 1249-54. Western Union appealed from this decision, contesting the propriety of the workweek standard as it applied to high salaried managerial employees whose exempt status is determined by the short test

the structure and substance of the applicable regulations.[55] The court noted that the question of how to define the primary duty of high-salaried managerial employees who deviate from their normal work course was the heart of the issue before them.[56] The Secretary argued that the workweek standard, although not present in the short test itself,[57] was a reasonable standard since it is present throughout the FLSA.[58] The *Marshall* court rejected this position because it determined that the FLSA was designed to protect wage earners and low-salaried employees,[59] and found no support in the Act for the conclusion that high-salaried employees are similarly protected.[60] Furthermore, the court summarily rejected the Secretary's contention that the repeated appearance of the workweek standard throughout the Act indicated a legislative intent that the same standard should apply to the short test.[61] This argument was dismissed as being in direct conflict with the accepted canons of statutory interpretation.[62]

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provisions. *Id.* at 1249. For a discussion of the two tests, *see* notes 30-38 and accompanying text *supra*.

55. 621 F.2d at 1249-52.

56. *Id.* at 1250. For the text of the regulation, and a discussion of other courts' determinations of primary duty, *see* note 38 and accompanying text *supra*.

57. *See, e.g.,* 29 C.F.R. § 541.1(f) (1980) (proviso) (short test defining executive). For the text of the regulation, *see* note 32 and accompanying text *supra*.

58. 621 F.2d at 1250. The court conceded that the workweek is a fundamental part of the FLSA. *Id. See, e.g.,* 29 U.S.C. § 206 (minimum wage); *id.* § 207 (maximum hours); *id.* § 213 (exemptions).

59. 621 F.2d at 1250-51. The Marshall court determined that the FLSA was manifestly designed to place a floor under wages and a ceiling on hours. *Id.* at 1250. The effect of the wage and hour limits was to distribute employment opportunities and compensate for overtime. *Id., citing* White v. Witwer Grocer Co., 132 F.2d 108, 110 (8th Cir. 1942).

60. 621 F.2d at 1251. The court stated that: "[t]here is nothing in the Act that demonstrates Congress had these concerns in mind for managerial employees and that it, therefore, intended the workweek standard also be applied to them in measuring their exempt status." *Id.* The court reasoned that Congress realized that the working conditions of high-salaried managerial employees would be significantly better than those of the hourly wage earner and that Congress, therefore, was not concerned with the number of hours worked per week by managerial employees, nor with their hourly wage. *Id. But see* Brennan v. Western Union Tel. Co., 561 F.2d 477, 484 (executives doing strike work indistinguishable from rank and file). *See also* note 44 and accompanying text *supra*.

61. 621 F.2d at 1251.

62. *Id.* Under established canons of statutory interpretations, the inclusion of a specific term in one section of a statute coupled with its exclusion in another section of the same statute establishes that such exclusion was intentional and the term should not, therefore, be implied. *See, e.g.,* FTC v. Sun Oil Co., 371 U.S. 505, 515 (1963). The *Sun* Court stated: "There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in [one section of the statute] the same broad meaning . . . which it explicitly provided by inclusion in [another section of the statute]; the reasonable inference is quite the contrary." *Id.* at 515.

In further considering the regulations, the court considered the definition of primary duty contained therein.[63] This regulation was felt to be aimed at a holistic approach to defining primary duty,[64] with time being just one element to be considered.[65] In conclusion, the court noted that the regulations themselves in no way compel the measurement of primary duty in any partciular time frame.[66]

The second approach taken by the *Marshall* court was to examine the practical effects that adoption of the workweek standard would have.[67] It was within their province, the court noted, to interpret the FLSA; [68] however, it would be beyond the scope of their power to add new substantive provisions to the Act.[69] The court felt there would be widespread repercussions throughout the industry and commerce of the nation should the workweek standard be accepted.[70] The court stated that the effect of accepting the workweek standard would be to accept a substantive amendment to the regulations.[71] The court deemed this to be a legislative function,[72] properly exercised only by the Secretary in accordance with the informal rulemaking procedures of the APA.[73] In view of its analysis, the *Marshall* court refused to accept the workweek standard, noting that the notice and comment provisions of the

63. 621 F.2d at 1252. *See* 29 C.F.R. § 541.103 (1980). For the text of the regulation defining primary duty, *see* note 38 *supra.*

64. 621 F.2d at 1252.

65. *See* 29 C.F.R. § 541.103 (1980). For the text of the regulation, *see* note 38 *supra.*

66. 621 F.2d at 1252.

67. *Id.* at 1252-54.

68. *Id.* at 1252-53, *citing* Rachal v. Allen, 376 F.2d 999, 1003 (5th Cir. 1967) (interpretation of the FLSA is a function of the courts as well as the Secretary); Walling v. LaBelle S.S. Co. 148 F.2d 198, 202 (6th Cir. 1945) (ultimate issue of coverage under the FLSA is a judicial question).

69. 621 F.2d at 1253, *citing* E.C. Schroeder Co. v. Clifton, 153 F.2d 385, 390 (10th Cir.), *cert. denied,* 328 U.S. 858 (1946). The *Schroeder* court stated:

> The [FLSA] is to be accorded a liberal construction. But the function of judicial interpretation of a statute is to bring out and give effect to that which is already in it, latent or otherwise. It is not to add new provisions, substantive or otherwise, which the legislative tribunal in the exercise of its permitted choice omitted or withheld.

153 F.2d at 390.

70. 621 F.2d at 1254. Some of the wide ranging effects envisioned by the court included increased recordkeeping, adjustments of workloads and payrolls, and weekly determinations of whether an employee was exempt or not from FLSA coverage. *Id.*

71. *Id.* at 1253.

72. *Id.* The effect of the court's ruling at this point was to leave the Secretary with recourse only to rulemaking procedures. For a discussion of the necessity of adhering to the informal rulemaking procedures of the APA when engaged in a legislative function, *see* notes 22-24 and accompanying text *supra.*

73. 621 F.2d at 1253-54.

APA will allow the Secretary to make an informed determination of what standard is appropriate for the short test provisions.[74]

In reviewing the *Marshall* court's holding, it is submitted that the court achieved a desirable result, although the route by which the court arrived at its decision failed to comply with the standard of judicial review for administrative interpretation of agency regulations which has been adopted by the Third Circuit.[75] Under the approach explicitly adopted in the Third Circuit, where an agency characterizes its ruling as interpretive, the courts are bound to accept that characterization, and the ruling may be overturned only if plainly erroneous or inconsistent with the regulation it purports to interpret.[76] Although the *Marshall* court examined the regulations in issue,[77] the court did not determine that the workweek standard was plainly erroneous or inconsistent with the short tests for managerial status.[78] At best, the court concluded that the workweek standard was not compelled by the use of the phrase primary duty.[79] However, it has been held that an agency's interpretation of its regulations, if reasonable, is *controlling* despite the existence of other interpretations which may seem more reasonable.[80]

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74. *Id.* at 1254. The court observed: "Section 553 was enacted to give the public an opportunity to participate in the rulemaking process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated. . . ." *Id., quoting* Texaco, Inc. v. FPC, 412 F.2d 740, 744 (3d Cir. 1969).

75. *See* Cerro Metal Prods. v. Marshall, 620 F.2d 964, 981-82 & nn.45-47 (3d Cir. 1980). In *Cerro* the court stated the approach adopted by the Third Circuit: "The alternative approach . . . , is to take the agency at its word. If an agency that has the statutorily delegated power to issue legislative rules chooses instead to issue an interpretive rule, the court accepts that characterization of the rule but is free to arrive at its own interpretation." *Id.* at 981, *citing* Daughters of the Miriam Center for the Aged v. Matthews, 590 F.2d 1250, 1255 n.9, 1258-59 (3d Cir. 1978). For a discussion of the legal effect test of administrative agency rulemaking which has been applied in the Third Circuit, *see* notes 27-29 and accompanying text *supra.*

76. *See* note 75 *supra.*

77. *See* notes 55-66 and accompanying text *supra.*

78. *See* 621 F.2d at 1251. The court noted that "our interpretation is consistent with the structure and substance of the regulations and effects a result compatible with economic reality." *Id. But see* Lucas Coal Co. v. Interior Bd. of Mine Operations Appeals, 522 F.2d 581, 584 (3d Cir. 1975). In *Lucas,* the court stated that "[a]n agency's explication of its regulation if reasonable, therefore, is controlling despite the existence of other interpretations that may seem even more reasonable." *Id., citing* Udall v. Tallman, 380 U.S. 1, 16 (1965). For a discussion of *Lucas* and *Udall, see* notes 21 & 49 and accompanying text *supra.*

79. *See* 621 F.2d at 1252; notes 56-62 and accompanying text *supra.*

80. *See* notes 18-21 and accompanying text *supra. See also* Udall v. Tallman, 380 U.S. 1, 16 (1965); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945); Lucas Coal Co. v. Interior Bd. of Mine Operations Appeals, 522 F.2d 581, 584 (3d Cir. 1975).

Had the *Marshall* court wished to adhere strictly to the legal effect test,[81] it is submitted that Judge Hunter's concurrence in *Brennan* provides the proper guidelines for such analysis.[82] Judge Hunter had noted that the broad language of the short test provisions is ill-suited to definition on a week-to-week basis, and hence the Secretary's interpretation is inconsistent with the regulation and not entitled to controlling weight.[83] The *Marshall* court hinted at this approach, but did not enunciate a finding of inconsistency.[84] Therefore, it is submitted that the *Marshall* court did not meet the requirement for judicial invalidation of an agency's interpretation of its own regulations in accordance with the method of judicial review as adopted in the Third Circuit.[85]

Conversely, it is submitted that the standard of review actually applied by the *Marshall* court is in accord with the approach taken by the majority of courts.[86] By examining the widespread ramifications which acceptance of the workweek standard would have,[87] the *Marshall* court was actually applying the substantial impact test.[88] Thus, although the Secretary proffered the workweek standard as an inter-

81. For a discussion of the legal effect test, *see* notes 27-29 and accompanying text *supra*.

82. 561 F.2d at 484-85 (Hunter, J., concurring). *See* note 51 and accompanying text *supra*.

83. 561 F.2d at 484-85 (Hunter, J., concurring). Judge Hunter, therefore, found a means of establishing that there was an inconsistency between the interpretive rule and the regulation that it purported to interpret. *Id.*

84. *See* notes 78-79 and accompanying text *supra*. The *Marshall* court did note that:

> [T]his suit at the present time does not attempt to resolve a particular controversy based on the law as it presently exists, but rather seeks to have this court enunciate a new rule which will then be applied for the first time to Western Union. The Secretary has never before proffered the workweek standard as a measure for primary duty under the regulation.

621 F.2d at 1253. It is submitted that the fact that the workweek standard had not been previously suggested as the measure of primary duty could be grounds for a finding that the rule is inconsistent with the regulation it supposedly interprets.

85. For a discussion of judicial standards of review for agency interpretive rulings, *see* notes 25-29 & 82-83 and accompanying text *supra*.

86. *See* note 26 and accompanying text *supra*.

87. For a discussion of the court's treatment of the practical consequences of adopting the workweek standard, *see* note 70 and accompanying text *supra*.

88. For a discussion of the substantial impact test, *see* note 26 *supra*. In describing the substantial impact test, the Third Circuit has said that the purpose of this test is to "distinguish between interpretive and legislative rules and then to strike down the latter if found to be masquerading as the former." Cerro Metal Prods. v. Marshall, 620 F.2d 964, 981 (3d Cir. 1980). Under this approach the courts look at what a rule "really" does. *Id.* If the rule substantially affects a legal interest, it must be promulgated in accordance with the notice and comment procedures of the APA. *Id.* For a discussion of the APA rulemaking procedures, *see* 5 U.S.C. § 553 (1976); note 18 *supra*.

pretation of the regulations,[89] the fact that it would have a substantial impact on those affected by the regulations led the court to determine that the ruling was in fact legislative.[90] In this context, the informal rulemaking procedures of the APA must be followed.[91]

It is submitted that the *Marshall* decision may have beneficial effect in two respects. Primarily, the *Marshall* court has prevented the implementation of agency rules through judicial acceptance of an arguably substantive amendment to the regulations.[92] This reflects a much warranted sensitivity for the business community as well as compliance with the notice and comment provisions of the APA.[93] Also, the court has reimplemented the substantial impact test, although not explicitly and possibly not even intentionally.[94]

The impact that the *Marshall* decision will have on the standard of judicial review to be applied to interpretive administrative rulings appears to be minimal.[95] It is submitted that, since the court never explicitly addressed the issue of the proper test to be applied by the courts when faced with a purported interpretive ruling, future courts will probably not look upon *Marshall* as a return to the substantial impact test.[96] Furthermore, since the *Marshall* court decided the issue without any discussion of the proper test to be applied, it is quite possible that the court never intended to rule on the question of which test the courts ought to apply. Thus, it is submitted that, although

89. This is evidenced by the fact that the Secretary, who had the delegated power to enact legislative rules, proffered the workweek standard at trial as an interpretation of the regulations. *See* 621 F.2d at 1248, 1253.

90. *See id.* at 1253-54.

91. *See* notes 23-24 and accompanying text *supra.*

92. *See* notes 63-66 & 68-71 and accompanying text *supra.*

93. It is submitted that those persons who will be severely effected by changes in agency regulations are necessarily interested and are to be afforded the opportunity to provide responsive commentary to the administrative agency. *See* 5 U.S.C. § 553(c) (1976). Given the obvious impact upon the business community that the proposed change would have, input from this sector is essential for effective rulemaking. *See* 621 F.2d at 1253-54. Furthermore, the adoption of the workweek standard would effect *all* short test managerial employees, regardless of the context in which they perform nonexempt work. *See id.* at 1253. Thus, it is submitted that every employer with short test managerial employees on the payroll would be effected, without opportunity to participate in the rule change which would result.

94. It is submitted that the court followed the substantial impact test by looking to the practical effect of what the interpretation would actually do. *See* notes 67-73 and accompanying text *supra.* For a discussion of the substantial impact test, *see* notes 24-26 and accompanying text *supra.* However, the *Marshall* court offered no discussion as to the method to be employed in reviewing the purported interpretive rules of an administrative agency, although the issue of the correct method to be employed had been reiterated by the court less than two weeks earlier. *See* Cerro Metals Prods. v. Marshall, 620 F.2d 964, 981-92 & nn.46-47 (3d Cir. 1980), *citing* Daughters of Miriam Center for the Aged v. Matthews, 590 F.2d 1250 (3d Cir. 1978).

95. *See* text accompanying notes 96-97 *infra.*

96. *See* notes 86-90 and accompanying text *supra.*

the possibility for debate exists, the *Marshall* court's acceptance without discussion of the substantial impact test will be looked upon not as a rejection of the legal test, but as a harmless misapplication of that test.[97]

It appears that the Secretary has no recourse available, other than the initiation of informal rulemaking proceedings, should he desire to make the workweek standard applicable to short test managerial employees.[98] However, it is submitted that this is unlikely to occur in light of the difficulty that the Secretary has encountered in attempting to utilize rulemaking procedures to modify other portions of the Regulations.[99] The resistance of the business community to attempt to make far less drastic revisions of the Regulations indicates that an amendment to the Regulations to compel overtime payments to high-salaried managerial employees who do rank and file work during a given workweek is not a realistic alternative at this time.[100] It is submitted, therefore, that in reality the *Marshall* court has done little more than maintain the pre-*Brennan* status quo between high-salaried managerial employees and their employers, while giving each constituency an opportunity to participate in the proceedings which may alter their relationship.[101]

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97. It is submitted that, when compared with the detailed consideration, presented in earlier cases, of which standard ought to be applied when courts are faced with what an agency asserts is an interpretive ruling, the *Marshall* case will not be viewed as determinative of the issue. *See* notes 75-76 and accompanying text *supra*.

Moreover, since the courts are not bound by an agency's interpretation under the legal effect test, the application of the substantial impact test in this case did not affect the final outcome of the case. For a discussion of the legal effect test, *see* notes 27-29 and accompanying text *supra*.

98. *See* notes 72-73 & 92-93 and accompanying text *supra*.

99. *Compare* 46 Fed. Reg. 3010 (1981) (indicating that the salary levels for the long and short tests had been increased as per a "final order") *with* 46 Fed. Reg. 12,206 (1981) (indicating that the "final order" had been rescinded and the notice and comment period reopened). No explanation for the recision of the increase in salary levels is given; however, it is not unreasonable to suppose that pressure from the business community is in part responsible for the action.

100. If responsibility for the recision of the order increasing the salary levels of the Regulations can indeed be attributed to the business community, it seems clear that the same pressures which compelled the recision of that order could effectively prevent implementation of the workweek as the standard for determining the loss of exempt status for short test managerial employees. *See* note 99 and accompanying text *supra*.

101. For a discussion of the *Brennan* decision, *see* notes 42-51 and accompanying text *supra*. For a discussion of the procedures relating to the APA's notice and comment provisions, *see* notes 18-19 and accompanying text *supra*.

LABOR LAW — NATIONAL LABOR RELATIONS BOARD (BOARD) — BOARD MUST DEFER TO AN ARBITRATION AWARD WHICH IS ARGUABLY CONSISTENT WITH BOARD POLICY.

NLRB v. Pincus Brothers, Inc. — Maxwell (1980)

On February 18, 1977, Jane Richardson was discharged from employment at Pincus Brothers, Inc. — Maxwell (Pincus),[1] after distributing a one-page leaflet[2] which criticized the company.[3] Following her dismissal, the Philadelphia Joint Board, Amalgamated Clothing Workers of America (Union) instituted grievance proceedings on her behalf which, under the collective bargaining agreement, ultimately resulted in arbitration.[4] On April 12 1977, the arbitrator ruled that the company had acted properly in discharging Richardson.[5]

Prior to the arbitrator's decision Richardson filed an unfair labor practice charge with the National Labor Relations Board claiming that Pincus had violated section 8(a)(1) of the National Labor Relations Act

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1. Pincus Bros., Inc.-Maxwell, 237 N.L.R.B. 1063 (1978), *enforcement denied,* 620 F.2d 367 (3d Cir. 1980). Richardson had worked in the sleeve department of the respondent's men's clothing manufacturing plant from December 1975 until her discharge on February 18, 1977. 237 N.L.R.B. at 1063. During the course of her employment, Richardson had been an active member of the Philadelphia Joint Board, Amalgamated Clothing Workers of America (Union). 620 F.2d at 370. On several occasions, she left her work station to talk with other employees and was directed by her supervisor not to waste time. *Id.* Previously, when there was insufficient work to keep all of the sleeve department employees working a 40-hour week, several employees and the union business agent asked that Richardson, the least senior member of the department, be laid off. *Id.* At that time, the company refused. *Id.*

2. 237 N.L.R.B. at 1063. Richardson started to pass out the leaflet in the plant prior to the 8 A.M. starting time and continued until approximately 8:05 A.M. 620 F.2d at 371. The plant manager claimed work production was disrupted because of employees reading the leaflet. *Id.* Richardson was then fired when she admitted distributing the leaflet. *Id.*

3. 237 N.L.R.B. at 1063. The leaflet, entitled "WE WON'T SACRIFICE FOR PINCUS' PROFITS," characterized the February 15, 1977 semi-annual plant meeting as a "circus." *Id.* It also claimed that Pincus was effectuating pay cuts by instituting certain changes in operation, and referred to the "lousy style of clothes" that Pincus was producing. *Id.*

4. 620 F.2d at 370-71.

5. 237 N.L.R.B. at 1063. In justifying the discharge, an arbitrator found that:

> Richardson had (1) abused working time and (2) written a handbill which she distributed during both working time and nonworking time which "intentionally misrepresented or distorted facts related to certain employment practices and business policies and product status of the company in a denigrating, disparaging fashion so as to constitute detrimental unprotected disloyalty."

Id.

(Act) [6] by discharging her for engaging in protected concerted activities. The Board's General Counsel agreed with the company to submit the case to the Board for a decision on the question of whether the Board should defer to the arbitrator's award.[7] Relying on the facts as found by the arbitrator, the Board agreed with the allegations stated in the grievance and, therefore, concluded that deferral to the arbitrator's award was not proper.[8]

In its decision, the Board remanded the case to an Administrative Law Judge (ALJ) for a hearing.[9] The ALJ found that Pincus had committed an unfair labor practice in discharging Richardson and ordered the company to reinstate her.[10] After adopting the ALJ's findings and conclusions in a supplemental decision and order, the Board sought judicial enforcement of its order.[11] The United States Court of Appeals for the Third Circuit [12] denied enforcement of the Board's order, *holding* that it is an abuse of the Board's discretion to refuse to defer to an arbitration award which is arguably consistent with Board policy. *NLRB v. Pincus Brothers, Inc. — Maxwell,* 620 F.2d 367 (3d Cir. 1980).

Section 10(a) of the Act gives the Board jurisdiction to adjudicate complaints of unfair labor practices.[13] In such adjudications, the Board

6. *Id. See* 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer — (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section [7] of this title." *Id.*

Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ..." *Id.* § 157. For a further discussion of unfair labor practices, *see* note 13 *infra.*

7. 237 N.L.R.B. at 1063. Pursuant to section 3 of the Act, the Board then delegated its power to a three-member panel which rendered the decision. 620 F.2d at 371, *citing* 29 U.S.C. § 153(b) (1976).

8. 237 N.L.R.B. at 1063. The Board concluded that Richardson was merely stating her opinion in characterizing the semi-annual plant meeting as a "circus" and in criticizing the level of pay at Pincus. *Id.* at 1064. The Board also found that her statements in the handbill were simply attempts to arouse her fellow workers to fight for higher wages and were not meant to disparage Pincus' product. *Id.* at 1065.

9. *Id.* at 1066. Pincus had requested that, if the Board did not defer to the arbitration award, the case be remanded to the ALJ for the taking of additional evidence since the ALJ had refused to admit any evidence regarding Pincus' motivation in discharging Richardson. *Id.* at 1065.

10. 620 F.2d at 371.

11. *Id.* The Board has the authority to petition the Court of Appeals for the circuit in which the unfair labor practice occurred for enforcement of its order. *Id.* at 371 n.6, *citing* 29 U.S.C. § 160(e) (1976).

12. The case was heard by Judges Garth, Gibbons, and Rosenn. Judge Rosenn wrote the majority opinion, Judge Garth wrote a concurring opinion, and Judge Gibbons wrote a dissenting opinion.

13. 29 U.S.C. § 160(a) (1976). Section 10(a) provides in pertinent part: "The Board is empowered, as hereinafter provided, to prevent any person

is not bound by any prior decision rendered by an arbitrator,[14] but does have the discretion to defer to an arbitration award.[15] In exercising this discretion, the Board must comply with its formally announced deferral policy.[16] In shaping this policy, the Board has attempted to fulfill both the design of the Act[17] and the national policy favoring the

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from engaging in any unfair labor practice (listed in section [8] of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." *Id.*

Section 8 of the Act proscribes employer conduct which: (1) interferes with, restrains, or coerces employees in their attempts to unionize under § 7 of the Act; (2) dominates or interferes with the formation or administration of any labor organization or contributes financial or other support to it; (3) discriminates in regard to hire or tenure of employment or any term or condition of employment which encourages or discourages membership in any labor organization; (4) discriminates against an employee because he has filed charges or given testimony under the Act; (5) involves a refusal to bargain collectively with the representatives of his employees. *Id.*

14. *See* NLRB v. Davol, Inc., 597 F.2d 782 (1st Cir. 1979) (Board retains the right to prevent unfair labor practices regardless of any other means of adjustment established by agreement); Hawaiian Hauling Serv., Ltd. v. NLRB, 545 F.2d 674 (9th Cir. 1976), *cert. denied,* 431 U.S. 965 (1977) (Board deference is discretionary); NLRB v. Walt Disney Prods., 146 F.2d 44 (9th Cir. 1944), *cert. denied,* 342 U.S. 877 (1946) (private agreements cannot restrict the Board's jurisdiction).

15. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1081 (1955). As the Supreme Court has stated: "[I]t is . . . well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the "fundamental aims of the Act." Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 271 (1963), *quoting* International Harvester Co., 138 N.L.R.B. 923, 925-26 (1962), *enforcement granted,* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied,* 377 U.S. 1003 (1964). *See also* William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12 (1974) (deferral is a matter of Board policy where there is both an unfair labor practice and a contract violation); NLRB v. Plasterers' Local Union, No. 79, 404 U.S. 116 (1971) (in the context of voluntary arbitration the Board can defer but is not bound by the Act to do so).

16. NLRB v. Horn & Hardart Co., 439 F.2d 674, 679 (2d Cir. 1971). The Board can change its standards for deference without abusing its discretion, since its rules regarding deference are self-imposed. *Id.* However, it cannot announce a policy and "then blithely ignore it, thereby leading astray litigants who depended upon it." *Id.*

17. Collyer Insulated Wire, 192 N.L.R.B. 830, 840 (1971); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955). The policy of the Act is to:

> [E]liminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these organizations when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

General Am. Transp. Co., 228 N.L.R.B. 808, 811 (1977) (Murphy Chairman, concurring), *quoting* 29 U.S.C. § 151 (1976).

voluntary settlement of labor disputes[18] through arbitration proceeding.[19] In doing so, however, the Supreme Court has made it clear that the Board must be careful to protect the public interest in eliminating unfair labor practices which may be involved when considering the desirability of private arbitration.[20]

The basis for the Board's policy regarding deferral to an arbitration award was set forth in *Spielberg Manufacturing Co.*[21] While holding

18. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955). (In deferring to arbitration the Board stated that it was:

> [A]djuring the parties to seek resolution of their dispute under the provisions of their own contract and thus fostering both the collective relationship and the Federal policy favoring voluntary arbitration and dispute settlement. And by reserving jurisdiction we preserve the right of the Charging Party to seek from us vindication of statutory rights should the arbitration reach a result not tolerable under the statute.

National Radio Co., 198 N.L.R.B. 527, 531 (1972).

19. International Harvester Co., 138 N.L.R.B. 923, 927 (1962), *enforcement granted,* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied,* 377 U.S. 1003 (1964). The Act provides that: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . . ." 29 U.S.C. § 173(d) (1976).

The Supreme Court has fully endorsed the policy favoring arbitration. *See* William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12 (1974); Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974); Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), *noted in* 16 VILL. L. REV. 176 (1970); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

For a general discussion of the role of the arbitrator, *see* Atleson, *Disciplinary Discharges, Arbitration and NLRB Deference,* 20 BUFFALO L. REV. 355 (1971); Belcher, *Are Arbitrators Qualified to Decide Unfair Labor Practice Cases,* 24 LAB. L.J. 818 (1973); Samoff, *Arbitration, Not NLRB Intervention,* 18 LAB. L.J. 602 (1967).

20. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 193 (1941), *citing* National Licorice Co. v. NLRB, 309 U.S. 350, 362 (1940). The arbitrator cannot provide an adequate remedy for violations of the unfair labor practice provisions of the Act. Collyer Insulated Wire, 192 N.L.R.B. 837, 855 (1971) (Jenkins, Member, dissenting). He can only dispose of an individual case, rather than settle a principle, and cannot provide a "cease and desist" remedy or provide other means of effectuating the purposes of the Act, such as posting notices. *Id.* The arbitrator is just a "part of a system of self-government created by and confined to the parties." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960), *quoting* Shulman, *Reason, Contract and Law in Labor Relations,* 68 HARV. L. REV. 999, 1016 (1955). He is not a "public tribunal" and has "no general charter to administer justice for a community which transcends the parties." *Id.* For a further discussion of the arbitrator's lack of power to provide effective remedies, *see* Murphy & Sterlacci, *A Review of the National Labor Relations Board's Deferral Policy,* 42 FORDHAM L. REV. 292, 344 (1973).

21. 112 N.L.R.B. 1080 (1955). The dispute in *Spielberg* involved the firing of four employees, allegedly for misconduct on the picket line during a strike. *Id.* at 1081. The employees, all members of the Union, admitted calling workers who crossed the picket lines "scabs." *Id.* at 1084-85. However, they denied allegations that they used "profane, insulting, or vile language,"

that it was not bound by the arbitrator's award, the Board stated that it would defer if: 1) the proceedings had been fair and regular; 2) all parties had agreed to be bound by the arbitrator's award; and 3) the decision of the arbitration panel was not "clearly repugnant" to the purposes and policies of the Act.[22] In *Collyer Insulated Wire*,[23] the

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as well as the charges that they committed acts of physical violence toward other employees. *Id.* at 1085.

Following an arbitration decision that Spielberg was not obligated to rehire the four employees, the Union filed a complaint with the Board. *Id.* at 1081. The complaint charged the company with violating §§ 8(a)(1) and 8(a)(3) of the Act in discharging employees for engaging in union activities. *Id.* at 1080-81.

For the text of § 8(a)(1) and a general discussion of unfair labor practices, *see* notes 6 & 13 and accompanying text *supra*. Section 8(a)(3) provides in pertinent part: "It shall be an unfair labor practice for an employer — (3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1976).

22. 112 N.L.R.B. at 1082. Since all three criteria had been met, the Board found that the desirable objective of encouraging the voluntary settlement of labor disputes would best be served by deference to the arbitrator's award. *Id.*

Although the Board has never expressly stated the weight to be given to each criterion, it can be argued that the "clearly repugnant" standard is the most important. The design of the Act is to prevent unfair labor practices and the Board is empowered to carry out the Act. *See* notes 13 & 17 and accompanying text *supra*. Consequently, the Board could never be bound by an arbitration decision which it finds is supportive of an unfair labor practice. *See* Monsanto Chem. Co., 97 N.L.R.B. 517 (1951), *enforcement granted*, 205 F.2d 763 (8th Cir. 1953). The other two criteria, however, are also important and *Spielberg* indicates that a failure to satisfy each of them independently could justify the Board's refusal to defer to the arbitrator. 112 N.L.R.B. at 1082. *See* Wertheimer Stores Corp., 107 N.L.R.B. 1434, 1435 (1954). Therefore, the *Spielberg* criteria first allow the Board an opportunity to satisfy itself that it has fulfilled its statutory duties and subsequently allow the Board to follow the national policy favoring the voluntary settlement of labor disputes, even if the Board might have decided the issue differently. *See* 112 N.L.R.B. at 1082. For a discussion of the national policy favoring arbitration, *see* notes 18-19 and accompanying text *supra*.

23. 192 N.L.R.B. 837 (1971). In *Collyer*, the company was charged with a section 8(a)(5) violation after it altered its pay scale for skilled employees without negotiating with the Union, as was required by their collective-bargaining agreement. *Id.* at 837-39.

Section 8(a)(5) provides in pertinent part: "It shall be an unfair labor practice for an employer — (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [9(a)] of this title." 29 U.S.C. § 158(a)(5) (1976).

Section 9(a) provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

Id. § 159(a).

For a further discussion of *Collyer*, *see* Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty*, 49 IND. L.J. 57 (1973); Johannesen & Smith, *Collyer: Open Sesame to Deferral*, 23 LAB. L.J. 723 (1972).

Board expanded its deferral policy by deciding to defer to an arbitration award, prior to the completion of the arbitration proceedings,[24] where the contract prescribed a complete and fully effective remedy.[25]

Following *Collyer*, the Board has decided that it would defer only when either pure contractual issues are involved[26] or when there is clear proof that the arbitrator considered both the contractual and unfair labor practice issues.[27] In *General American Transportation*

24. 192 N.L.R.B. at 839. The Board stated that since contractual issues were involved, the dispute could "better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute." *Id.* The Board, however, did retain jurisdiction, so that it could entertain a motion for further consideration should the arbitrator's findings be found to be inconsistent with the *Spielberg* standard. *Id.* at 843.

25. *Id.* at 839. The Board summarized its decision by stating four reasons why deferral was appropriate: 1) pure contract issues were involved; 2) the parties had a long and successful bargaining relationship; 3) the parties were not opposed to the use of arbitration; and 4) there was no claim of enmity by the company to the employees' exercise of their protected rights. *Id.* at 842.

26. *See, e.g.,* Croation Fraternal Union, 232 N.L.R.B. 1010 (1977); Roy Robinson Chevrolet, 228 N.L.R.B. 828 (1977).

In *Croation,* § 8(a) (5) and, derivatively, § 8(a)(1) charges were filed against the employer, claiming that, in disregard of its good-faith bargaining obligations to the Union, it unilaterally and without prior notice or consultation with the Union, permanently subcontracted work previously performed by its employees and terminated employees; forbade employees from holding any more union meetings on the company's premises; and prohibited employees from further use of the telephones at the company's premises. 232 N.L.R.B. at 1010. In deciding to defer, the Board stated that, as Board law stood in 1977, in a § 8(a)(5) case where a "substantial" question of contract interpretation lies at the core of the dispute and the resolution of that question by an arbitrator will also resolve the unfair labor practice issue, "a showing that the matters in the controversy arguably fall within the ambit of a contract's arbitration clause is enough to invoke application of the Board's deferral policy." *Id.* at 1014.

In *Roy Robinson,* §§ 8(a)(5) and 8(a)(1) charges were brought against the company after it closed its body shop and discharged certain employees without prior notice to and bargaining with the Union. 228 N.L.R.B. at 828. In reaching its decision to defer, the Board reviewed the status of *Collyer,* and held that it still requires deferral where there is an issue of contract interpretation, a § 8(a)(5) charge, and an established grievance procedure culminating in arbitration for resolution of issues of contract interpretation. *Id.* at 829.

For the text and a further discussion of § 8(a)(1), *see* notes 6 & 13 *supra.* For the text of § 8(a)(5), *see* note 23 *supra.*

27. Airco Indus. Gases, 195 N.L.R.B. 676 (1972). In *Airco,* an employee was terminated because of negligence, failure to follow instructions, and his past work record. *Id.* at 676. Upon receiving notice of his termination, the employee filed a grievance and the Union filed §§ 8(a)(1) and 8(a)(3) charges alleging that his discharge was unwarranted by past company practice. *Id.* At the arbitration hearing, the parties agreed that the issue was whether the discharge was due to the employee's union activities. *Id.* The arbitrator concluded that the employee had been guilty of negligence, but that the discharge should be reduced to a suspension without pay. *Id.* The Board, finding no indication in the arbitrator's opinion and award that he considered the issue of a discriminatory discharge, held that deferral in such a case "would result

Co.,[28] the Board further refined its position by stating that it would defer only when there is a pure contract dispute and where "there is no alleged interference with individual employees' basic rights under Section 7 of the Act." [29]

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in an extension of the *Spielberg* doctrine which we are unwilling to make." *Id.* at 676-77. For the text of § 8(a)(3), *see* note 21 *supra*.

Where there are contractual and statutory unfair labor practice issues present, the resolution of the contractual issue must be congruent with the resolution of the statutory issue for the Board to defer without abdicating its statutory duties. Banyard v. NLRB, 505 F.2d 342, 345-46 (D.C. Cir. 1974).

In 1974, the Board overruled *Airco* stating that, in order to uphold the *Spielberg* doctrine, full effect must be given to arbitration awards in cases dealing with discipline or discharge, except when unusual circumstances show that there should not be a deferral. Electronic Reproduction Serv. Corp., 213 N.L.R.B. 758 (1974). However, in *Suburban Motor Freight, Inc.*, the Board overruled *Electronic Reproduction* and returned to the standard used in *Airco*. 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113, 1114 (1980).

In *Suburban Motor Freight*, the Board stated that its former policies under *Electronic Reproduction* promoted the statutory purpose of encouraging collective-bargaining relationships, but derogated the equally important purpose of protecting employees in the exercise of their rights under § 7 of the Act. 103 L.R.R.M. at 1114. In holding that it can no longer "adhere to a doctrine which forces employees in arbitration proceeding to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter," the Board noted that, since the union's interests may not coincide with the individuals', it cannot deprive the "individual employees of their statutory rights under the guise of deferring to and encouraging arbitration." *Id., quoting* Schatzski, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 909 n.32 (1975).

28. 228 N.L.R.B. 808 (1977).

29. 228 N.L.R.B. at 810 (Murphy, Chairman, concurring). The complaint filed in *General American* alleged that an employee was laid off because he was active in the Union. *Id.* at 819. The company urged that the §§ 8(a)(3) and 8(a)(1) allegations be deferred to arbitration in accordance with *Collyer*. *Id.* at 808. The case was heard by the full Board, with a resulting two-one-two split. In dissent, Members Penello and Walther claimed that deferral was proper under *Collyer*. *Id.* at 813-19 (Penello & Walther, Members, dissenting). Members Fanning and Jenkins, writing for the majority, argued that deferral was inappropriate since the Board "has a statutory duty to hear and to dispose of unfair labor practices and . . . cannot abdicate or avoid its duty by seeking to cede its jurisdiction to private tribunals." *Id.* They continued their reasoning by criticizing the *Collyer* doctrine and claiming that it stripped employees of their statutory rights by forcing them into arbitration. *Id.* at 809. Chairman Murphy concurred in the result reached by Members Fanning and Jenkins, but disagreed with the portion of their rationale denying the Board any discretion to defer. *Id.* at 810 (Murphy, Chairman concurring). As a result of this split, Chairman Murphy's views have been recognized as controlling the deferral policies of the Board. *See* Roy Robinson Chevrolet, Inc., 228 N.L.R.B. 828, 831-32 (1977) (Chairman Murphy joining Members Penello and Walther in deciding that deferral is appropriate in a pure contract dispute case).

In her concurring opinion, Chairman Murphy discussed the Board's policy regarding deferral. *Id.* at 810-13 (Murphy, Chairman, concurring). She stated that the Board should not defer when the dispute is between the employee and the employer or union. *Id.* at 810 (Murphy, Chairman, concurring). Deferral is proper, however, when the dispute is based on conduct assertedly in derogation of the contract and the principal issue is whether the complained-of conduct is permitted by the parties' contract. *Id.* Chairman Murphy stated that

When a Board decision on the facts is reviewed by a Court of Appeals,[30] the decision may be reversed if it is not supported by substantial evidence on the record as a whole.[31] However, in reviewing Board decisions on deferral to an arbitrator's award, the courts must ensure that the Board adheres to its self-imposed restraints on its discretion,[32] and can overturn the Board if it has abused that discretion.[33] The abuse of discretion standard is viewed as proper because the Board's policies on deferral are not mandated by law, but rather are self-imposed.[34]

The majority of the Courts of Appeals which have considered the issue have held that the Board has considerable discretion regarding

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deferral was not proper when statutory rights were involved because: 1) it does not further the fundamental aims of the Act since the prosecution of those rights is the very reason for the Board's existence; 2) an aggrieved employee has no standing to "compel the union to process the grievance through arbitration if the grievance is resolved against the employee," thus allowing the union "wide discretion in determining which grievances to pursue to arbitration and which to abandon or to trade off in favor of some other advantage"; 3) at arbitration, the employee is merely a third party and has no standing to participate as a party, to have counsel different from union counsel, to examine witnesses, or to submit evidence; and 4) the arbitrator generally is authorized only to determine the contract issue presented by the grievance. *Id.* at 812-13 (Murphy, Chairman, concurring). For a criticism of Chairman Murphy's reasoning, *see* Covington, *Arbitrators and the Board: A Revised Relationship,* 57 N.C.L. REV. 91, 102-03 (1978).

30. A court of appeals may review a Board decision when the Board petitions the court for enforcement of its order, pursuant to § 10(e). 29 U.S.C. § 160(e) (1976). The Board's decision may also be reviewed when "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought" appeals the decision pursuant to § 10(f). *Id.* § 160(f).

31. *Id.* § 160(e-f). Section 10(e) states in pertinent part: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive." *Id.* § 160(e). Similar language appears in § 10(f). *Id.* § 160(f). *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951); NLRB v. American Postal Workers Union, 618 F.2d 1249, 1254 (8th Cir. 1980).

32. Hawaiian Hauling Serv., Ltd. v. NLRB, 545 F.2d 674, 676 (9th Cir. 1976), *cert. denied,* 431 U.S. 965 (1977). For a discussion of the Board's self-imposed restraints, *see* notes 21-29 and accompanying text *supra.*

33. Hawaiian Hauling Serv., Ltd. v. NLRB, 545 F.2d 674, 676 (9th Cir. 1976), *cert. denied,* 431 U.S. 965 (1977). *See also* Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 407 (9th Cir. 1978); Local 700, Machinists Union v. NLRB, 525 F.2d 237, 244 (2d Cir. 1975); NLRB v. Horn & Hardart Co., 439 F.2d 674, 679 (2d Cir. 1971). Use of the abuse of discretion standard does not preclude use of the substantial evidence standard, since a party appealing the Board's decision on deferral can also claim that the decision was not supported by substantial evidence on the record as a whole. Hawaiian Hauling Serv., Ltd. v. NLRB, 545 F.2d at 676 n.4.

34. NLRB v. Horn & Hardart Co., 439 F.2d 674, 678-79 (2d Cir. 1971). In first establishing a deferral policy in *Spielberg,* the Board recognized that, while deferral was not required, it would exercise its discretion to defer, since deferral would best serve the desirable objective of encouraging the voluntary settlement of labor disputes. Spielberg Mfg. Co., 112 N.L.R.B. at 1082. For a further discussion of *Spielberg, see* notes 21-22 and accompanying text *supra.*

deferral.[35] Board orders refusing to defer have been upheld where the award is repugnant to the Act,[36] where the unfair labor practice issue was not "clearly decided" by the arbitrator,[37] and where the arbitration proceedings were not "even-handed."[38] On the other hand, a Board order refusing to defer was overturned by the Ninth Circuit in *Douglas Aircraft Co. v. NLRB*.[39] In *Douglas,* the arbitrator had supplied two reasons why an employee's backpay was properly withheld by the company.[40] Of the two reasons, only one could independently justify the company's actions.[41] The Board, however, refused to defer, finding the arbitrator's award to be clearly repugnant to the purposes and policies of the Act.[42] The Ninth Circuit overturned the Board's decision, holding that if an arbitration award can plausibly be interpreted

35. *See* NLRB v. Owners Maint. Corp., 581 F.2d 44 (2d Cir. 1978) (no requirement that the Board must invariably defer); NLRB v. Columbus Printing Pressmen, 543 F.2d 1161 (5th Cir. 1976) (Board can at any time exercise its jurisdiction over unfair labor practices, regardless of arbitration proceedings); NLRB v. Horn & Hardart Co., 439 F.2d 674 (2d Cir. 1971) (Board does not have to "automatically" defer).

36. *See, e.g.,* NLRB v. Owners Maint. Corp., 581 F.2d 44 (2d Cir. 1978) (arbitrator found that the stated reason for employees' dismissal was insufficient, but held that the discharge did not violate § 8(a)(3) because it was not a discrimination based on union membership, even though the employees were dismissed for union activity).

37. *See, e.g.,* Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977), *aff'd after remand,* 614 F.2d 1210 (9th Cir. 1980) (no evidence that the unfair labor practice issue was either raised or considered at the arbitration proceeding).

38 T.I.M.E. — DC, Inc. v. NLRB, 504 F.2d 294 (5th Cir. 1974). The *T.I.M.E. — DC* court stated that "[w]here both the employer and the union are hostile to an employee's interests, the Board has properly refused to defer to an arbitral or grievance procedure invoked and administered by the employer and the union." *Id.* at 302.

39. 609 F.2d 352 (9th Cir. 1979). The Ninth Circuit had also overturned the Board's refusal to defer in Servair, Inc. v. NLRB, 607 F.2d 258 (9th Cir. 1979) (withdrawn from publication, pending rehearing). *Servair,* however, has since been remanded to the Board for further consideration and application of the *Spielberg* doctrine. Servair, Inc. v. NLRB, 624 F.2d 92 (9th Cir. 1980).

40. 609 F.2d at 353. The employee had originally been discharged and the arbitrator ordered his reinstatement, but denied him backpay. *Id.* The two reasons for his decision were the employee's pattern of abusive and uncivil conduct and the employee's refusal to agree to a settlement worked out by the company and the union which called for reinstatement, arbitration of the backpay issue, and withdrawal of the unfair labor practice charge. *Id.*

41. *Id.* The company and the union had jointly requested that the arbitrator clarify his original decision. *Id.* He responded that there was no evidence that the employee had been discharged for union activities, and that the two reasons for denying backpay were each independent and sufficient. *Id.* The arbitrator's holding that the employee had a pattern of abusive and uncivil conduct was found to be sufficient to uphold the award, while his decision that the employee should be denied backpay for refusing to agree to a settlement was found to be repugnant to the Act. *Id.* at 354.

42. *Id.* at 353. The Board had interpreted the arbitrator's original decision as resting upon both of the stated reasons, and viewed the clarification procedure as "result-reaching" and "prejudicial." *Id.* at 354.

as consistent with the Act, then, because such an award is not "clearly repugnant" to the Act, deference is required.[43]

In its attempt to deal with the question of Board deferral, the District of Columbia Circuit fashioned a test along the lines of current Board policy.[44] In *Banyard v. NLRB*,[45] a case dealing with the dismissal of an employee in violation of his union contract, the court enunciated two additional factors which must be added to the requirements for deferral under *Spielberg*: 1) the arbitration tribunal must have clearly decided the issue on which the Board is asked to give deference; and 2) the tribunal must have decided an issue within its competence.[46]

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43. *Id.* at 354-55. *See also* Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). The court explained that such a practice helps effectuate the federal policy favoring arbitration and prevents the overzealous dissection of opinions which can deter arbitrators from writing full opinions. 609 F.2d at 355. For a discussion of *Spielberg, see* notes 21-22 and accompanying text *supra.*

44. For a discussion of current Board policy regarding deferral, *see* notes 21-29 and accompanying text *supra.*

45. 505 F.2d 342 (D.C. Cir. 1974). In *Banyard,* an employee, who was also the Union's appointed shop steward, was fired for refusing to drive a truck when to do so would have been admittedly in violation of Ohio state law. *Id.* at 343. The contract between the company and the Union provided that "employees would not be required to violate any applicable statute or a governmental regulation relating to safety." *Id.* at 343-44 (footnote omitted). Pursuant to the contract, the Union had prosecuted the employee's grievance through two stages of the grievance procedure when the employee filed §§ 8(a)(1) and 8(a)(3) charges with the Board. *Id.* at 344. After the Union's claim was denied at the final stage of the contract grievance procedure, the Board decided to dismiss the unfair labor practice complaint and defer to the decision of the National Grievance Procedure under the *Spielberg* doctrine. *Id.* The court reversed the Board's decision, holding that the *Spielberg* and *Collyer* doctrines are only to be applied "where the resolution of the contractual issues is congruent with the resolution of the statutory unfair labor practice issues." *Id.*

For a further discussion of *Spielberg* and *Collyer, see* notes 21-25 and accompanying text *supra.*

46. 505 F.2d at 347. This new "five-prong" test was also adopted by the Ninth Circuit in Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977), *aff'd after remand,* 614 F.2d 1210 (1980). The *Stephenson* court further explained these two additional requirements:

> The "clearly decided" requirement means that the arbitrator's decision must specifically deal with the statutory issue. Merely because the arbitrator is presented with a problem which involves both contractual and unfair labor practice elements does not necessarily mean that he will adequately consider the statutory issue, and merely because he considers the statutory issue does not mean that he will enforce the rights of the parties pursuant to and consistent with the Act. The "clearly decided" requisite is designed to enable the Board and the courts to fairly test the standards applied by the arbitrator against those required by the Act. . . .
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> The "competence" criterion . . . arises from the belief that deference is appropriate only where there is a congruence between the statutory and contractual issues. . . . [It] requires the Board to ascertain the underlying issues in the unfair labor practice charges and

In *Radio Television Technical School, Inc. v. NLRB*,[47] the Third Circuit was presented with a dispute which centered around section 8(a)(1) and 8(a)(5) charges[48] that the company had discontinued Christmas payments to Union employees without bargaining with the Union.[49] The Board refused to defer to the arbitration award on the ground that it had ignored a long line of Board and court precedent.[50] In upholding the Board's refusal to defer, the Third Circuit recognized that Board deferral is strictly voluntary,[51] and that "where the Board disagrees with the decision of the arbitrator, 'the Board's ruling would, of course, take precedence . . . .'"[52]

Against this background, the *Pincus* court began its analysis by stating that the Board's decision not to defer to the arbitration award could only be overturned if it constituted an abuse of discretion.[53] In order to determine whether the Board had abused its discretion, the court found it necessary to decide whether the arbitration award was

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to determine whether arbitral expertise and institutional competence justify deferral to arbitration of a particular statutory dispute.

550 F.2d at 538 n.4.

47. 488 F.2d 457 (3d Cir. 1973).

48. 488 F.2d at 459. For the text of § 8(a)(1), *see* note 6 *supra*. For a further discussion of unfair labor practices, *see* note 13 *supra*. For the text of § 8(a)(5), *see* note 23 *supra*.

49. 488 F.2d at 459. The compnay had been giving its employees Christmas gifts since 1950. *Id.* In 1965 or 1966, the company began making these gifts in the form of money payments but withheld making the payments in 1970 to employees who had joined the Union the past summer. *Id.* All non-union employees, however, still received their Christmas payments. *Id.*

50. *Id.* at 461. The arbitrator found that the payments were made at the company's discretion, and therefore, could legally be discontinued without subjecting the matter to the collective bargaining process. *Id.* Past Board and court decisions, however, had held that such gifts, when made over a substantial period of time and when based on the respective wages earned by the recipients, were actually "wages," thus requiring the matter to be submitted to the collective bargaining process. *Id.* at 460-61. *See, e.g.*, NLRB v. Electric Steam Radiator Corp., 321 F.2d 733 (6th Cir. 1963); NLRB v. Wheeling Pipe Line, 229 F.2d 391 (8th Cir. 1956); NLRB v. Niles-Bement Pond Co., 199 F.2d 713 (2d Cir. 1952).

51. 488 F.2d at 461. *See also* notes 14-16 and accompanying text *supra*.

52. 488 F.2d at 461, *citing* Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964). Other Third Circuit cases which have addressed the issue of Board deferral to arbitration awards include: Wheeling-Pittsburgh Steel Corp., 618 F.2d 1009, 1015 (3d Cir. 1980) (Board does not abuse its discretion in considering the unfair labor practice issue when deferral is not raised as an affirmative defense); Food Fair Stores, Inc. v. NLRB, 491 F.2d 388, 395 n.9 (3d Cir. 1974) (same); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969) (recognizing the "strong public policy of encouraging the peaceful settlement of industrial disputes by means of the device of arbitration").

53. 620 F.2d at 372. The court noted that since *Spielberg* is a discretionary administrative doctrine and not a legislative or judicial standard of Board deferral, the Board's failure to defer can only be reversed for an abuse of discretion. *Id.* at 372 n.8. For a further discussion of the proper standard of review, *see* notes 30-34 and accompanying text *supra*. For a discussion of

"clearly repugnant" to the Act.[54] In making this decision, the court first examined the source of the Board's deferral policy.[55] Noting the congressional preference for the private settlement of disputes,[56] the court stressed the fact that, in formulating its deferral policy, the Board was attempting to effectuate the national policy favoring arbitration.[57] The court also emphasized the voluntary nature of arbitration and the Board's desire to hold parties to their contractual commitments.[58]

Following its examination of the policy behind arbitration, the *Pincus* court advanced three reasons why deference is proper: 1) "the societal rewards of arbitration outweigh a need for uniformity of result or a correct resolution of the dispute in every case"; 2) the parties are not injured by deference since they have selected and agreed to be

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Judge Garth's opinion that Board decisions should be reviewed under an error of law standard, *see* notes 63-68 and accompanying text *infra.*

54. 620 F.2d at 372. The court viewed this as the determinative issue in the case, as the parties had agreed that the proceedings were fair and regular and that they agreed to be bound, thus fulfilling two of the three criteria of the *Spielberg* standard. *Id.* at 371-72. The court also noted that the arbitration decision clearly showed that the arbitrator considered and ruled upon the unfair labor practice issue. *Id.* at 372 n.7.

For a further discussion of the *Spielberg* criteria, *see* notes 21-22 and accompanying text *supra.* For a further discussion of the importance of the arbitration ruling on the unfair labor practice issue, *see* notes 27 & 44-46 and accompanying text *supra.*

55. 620 F.2d at 372-73.

56. *Id.* at 372, *citing* 29 U.S.C. § 173(d) (1976) (calling for the voluntary settlement of disputes). For the text of § 173(d), *see* note 19 *supra.*

57. 620 F.2d at 373. The court stated:

> If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board . . . should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself," and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.

Id., quoting International Harvester Co., 138 N.L.R.B. 923, 926-27 (1962), *enforcement granted,* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied,* 377 U.S. 1003 (1964). For a discussion of this national policy, favoring voluntary arbitration *see* notes 18-19 and accompanying text *supra.* According to the *Pincus* court, recognition of the national policy "[a]t the very least means that the interpretation of labor arbitrators must not be disturbed so long as they are not in 'manifest disregard' of the law, and that 'whether the arbitrators misconstrued a contract' does not open the award to judicial review.'" 620 F.2d at 374, *quoting* Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969).

58. 620 F.2d at 373. The court stated: "We are not compelling any party to agree to arbitrate disputes arising during a contract term, but are merely giving full effect to their own voluntary agreements to submit all such disputes to arbitration, rather than permitting such agreements to be side-stepped . . . ." *Id., quoting* Collyer Insulated Wire, 192 N.L.R.B. at 842. For a discussion of *Collyer, see* notes 23-25 and accompanying text *supra.*

bound by the arbitration process; and 3) deference will effectuate the intent of the parties in the collective bargaining agreement and avoid the time, expense, and inconvenience of duplicative proceedings.[59] The court further noted that the parties should be bound by an arbitration award which has been rendered and is arguably consistent with Board policy, since "[t]he parties accepted the risk that arbitration results could differ from Board decisions when they elected to proceed by arbitration and the Board recognized such possibilities when it adopted the policy to defer to an arbitrator's award." [60]

The *Pincus* court went on to hold that the Board abuses its discretion when it does not defer to an arbitration award which can arguably be reconciled with the policies of the Board.[61] The court concluded that, because Richardson's activity was arguably not protected under section 8(a)(1), the arbitrator's decision was not "clearly repugnant" to the Act, and, therefore, that the Board abused its discretion in not deferring to the award.[62]

In a concurring opinion, Judge Garth agreed that the arbitration award was not "clearly repugnant" to the purposes and policies of the Act, but disagreed as to the proper standard of review for Board decisions.[63] In discussing the conflict between the Board's power to

59. 620 F.2d at 374.

60. *Id.* at 374-75.

61. *Id.* at 374. The court concluded that "[i]f the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was 'clearly repugnant' to the Act." *Id., quoting* Douglas Aircraft Co. v. NLRB, 609 F.2d at 354. For a discussion of *Douglas, see* notes 39-43 and accompanying text *supra.*

In *Pincus,* the arbitrator held that Richardson's discharge was proper since she had abused working time and had written the handbill which intentionally misrepresented facts. 620 F.2d at 371. The discharge could have been permissible under the first reason; but the Board found the second reason impermissible, and refused to defer since dismissal under the second reason constituted a violation under § 7 of the Act. 237 N.L.R.B. at 1063-65. For the text of § 7, *see* note 6 *supra.*

62. 620 F.2d at 375-77. The court provided four reasons why Richardson's activities were arguably unprotected: 1) an employee loses the protection of the Act where his or her statements are "deliberately or maliciously false," and the arbitrator's findings that the semi-annual plant meeting served legitimate and constructive purposes, that the company was not instituting pay cuts, and that the working conditions and clothes produced at Pincus Brothers were among the best in the industry, make it at least arguable that Richardson's leaflet can be labeled as "defamatory or insulting material known to be false"; 2) her actions arguably constituted unprotected disloyalty since the arbitrator found that the leaflet tarnished the image and impeded the legitimate business goals of the company; 3) her activity was inconsistent with the fundamental policy of the Act as her activities were intended to interfere with the company's long-established collective bargaining relationship with the Union; and 4) a single employee acting alone is not engaged in "concerted activity" within the meaning of the Act. *Id.* at 375-77 (citations omitted).

For a discussion and the text of § 8(a)(1), *see* notes 6 & 13 *supra.*

63. 620 F.2d at 377 (Garth, J., concurring).

decide unfair labor practice charges under section 10(a)[64] and the congressional desire for voluntary settlement of disputes under section 173(d) of the Act,[65] Judge Garth concluded that the Board does have the discretion to formulate a policy of deference to arbitration awards.[66] According to Judge Garth, however, once the Board announces a policy, it is bound by that policy and its original discretion under section 10(a) is displaced.[67] Consequently, he argued, the proper standard of review in unfair labor practice cases is one of legal error, since the *Spielberg* doctrine does not confer any additional discretion upon the Board.[68]

In a strong dissent, Judge Gibbons asserted that, under the terms of the Act, the Board has the power to defer only when the unfair labor practice charge is that employees are striking for work acquisition.[69] In any other situation, he contended, deferral constitutes a failure by the Board to exercise its proper jurisdiction.[70] In con-

64. *Id.* at 378 (Garth, J., concurring). For a discussion and the text of § 10(a), *see* note 13 and accompanying text *supra.*

65. 620 F.2d at 378 (Garth, J., concurring). For the text of § 173(d), *see* note 19 *supra.*

66. 620 F.2d at 378 (Garth, J., concurring). Judge Garth stated that the Board's original discretion is a result of the inherent tension between two separate congressional pronouncements, one requiring the Board to prevent unfair labor practices and the other calling for Board approval of voluntary arbitration agreements. *Id.* Consequently, the Board has the freedom to work out a policy on deference which rests somewhere between the two congressional extremes. *Id.*

67. *Id.* at 379 (Garth, J., concurring). Judge Garth does note, however, that the Board does retain the power to explicitly change its policy. *Id.* at 380 (Garth, J., concurring). The loss of original discretion concerns the Board's obligation to apply its formally announced policy. *Id.* at 379 (Garth, J., concurring).

68. *Id.* at 380-81 (Garth, J., concurring). Judge Garth contended that the *Spielberg* doctrine requires the Board to determine only whether the three parts of the test are satisfied, each of which ultimately involves a nondiscretionary question of law. *Id.* at 381 (Garth, J., concurring).

69. *Id.* at 386-87 (Gibbons, J., dissenting). Section 158(b)(4)(D) makes it an unfair labor practice for employees to strike for work acquisition. 29 U.S.C. § 158(b)(4)(D). The Board is given special authority to deal with such strikes under section 10(k), which provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance of the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

29 U.S.C. § 160(k) (1976).

70. 620 F.2d at 386-87 (Gibbons, J., dissenting). Judge Gibbons relied upon an interpretation of § 10(c) which provides that the Board must decide whether there has been a violation of the Act when the General Counsel files

sidering the Board's deferral policy, Judge Gibbons claimed that deferral to arbitration is improper since it saves no time, effort, or cost in the administrative process; [71] and its application in any given case is unpredictable.[72] He further contended that arbitration does not fulfill the public policy demands required of the Board.[73] The dissent concluded that if deferral is proper in any circumstances, it is only so when the issues concerning the contractual and statutory rights are congruent.[74] In any other situation, argued Judge Gibbons, deferral forces the Board to abdicate its statutory duty to protect employees in the exercise of their section 7 rights.[75]

It is submitted that the *Pincus* decision extends the Board's deferral policy to cases in which the Board would hold that the unfair

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an unfair labor practice complaint. *Id.* at 386 (Gibbons, J., dissenting), *citing* 29 U.S.C. § 160(c) (1976).

71. 620 F.2d at 389 (Gibbons, J., dissenting). Judge Gibbons stated that, in unfair labor practice cases, an initial investigation is always made to determine whether the charge should be prosecuted. *Id.* Consequently, when a decision to defer is made at a later time, the administrative resources have already been expended. *Id.*

72. *Id.* Judge Gibbons stated that the unpredictability is due to the Board's freedom to decide not to defer when its standards are not met. *Id.* at 389-90 (Gibbons, J., dissenting).

73. *Id.* at 390 (Gibbons, J., dissenting). Judge Gibbons stated:

> Obviously a remedy selected by an arbitrator in processing an individual grievance may be wholly inadequate to enforce the public policy against unfair labor practices. Reinstatement of a single victim of a discharge for engaging in protected activity, for example, may afford no protection for other potential victims of similar discrimination, while a Board order could afford such protection. Finally, inasmuch as an arbitrator is not even required to prepare findings of fact, there may be instances in which the reasons for his decision, and thus its consistency with the policies behind the Act are both unknown and unknowable. A policy of absolute deferral would be plainly inconsistent with the Board's public responsibilities.

Id. For a discussion of those public policy demands, *see* notes 17-20 and accompanying text *supra.*

74. 620 F.2d at 392-94 (Gibbons, J., dissenting). Judge Gibbons noted that the Board has recognized a difference between contractual and statutory issues and has since altered its policy on deferral to reflect that change. *Id.* at 392 (Gibbons, J., dissenting), *citing* General Am. Transp. Co., 228 N.L.R.B. at 810-11 (Murphy, Chairman, concurring).

For a further discussion of the Board's current deferral policy, *see* notes 21-29 and accompanying text *supra.*

75. 620 F.2d at 394 (Gibbons, J., dissenting). Judge Gibbons also stated that contract arbitration does not provide adequate protection for the statutory rights of all employees. *Id.* at 399 (Gibbons, J., dissenting). First, if there is no congruence of interest between the majority and minorities in the bargaining unit, the provisions of the contract will usually reflect majority concerns. *Id.* "Second, the typical contract places control of the grievance-arbitration mechanism in the practical control of the union or the employer, again to the detriment of the protection of minority rights." *Id.* Finally, there is almost no judicial review of arbitration decisions, thus preventing the judiciary from protecting the minority's viewpoint. *Id.*

labor practice charge was not properly decided.[76] The basis for this decision was a desire to hold the Board to its formally announced policy on deferral.[77] It is suggested, however, that in reaching its decision the court overlooked the changes which have occurred in the Board's deferral policy following its decisions in *Spielberg*[78] and *Collyer.*[79] While the Board still employs the *Spielberg* criteria, it has added a requirement that, in cases involving both issues of contractual and statutory rights, there must be evidence that both issues were decided by the arbitrator.[80] As a result, the Board often finds deferral to be appropriate in pure contract dispute cases such as *Collyer,* but is reluctant to defer in any case involving an unfair labor practice issue.[81]

It is further submitted that the *Pincus* court's failure to consider the changes in the Board's deferral policy created other problems in its analysis. First, the court relies upon the national policy favoring

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76. *See* notes 61-62 and accompanying text *supra.* For a discussion of the reasons why the Board thought deferral was improper, *see* note 8 *supra.*

77. 620 F.2d at 372. For a discussion of the Board's policy on deferral, *see* notes 21-29 and accompanying text *supra.*

78. 112 N.L.R.B. 1080 (1955). For a discussion of *Spielberg, see* notes 21-22 and accompanying text *supra.*

79. 192 N.L.R.B. 837 (1971). For a discussion of *Collyer, see* notes 23-25 and accompanying text *supra.*

80. Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113, 1114 (1980). In *Suburban Motor Freight,* the Board stated: "In specific terms, we will no longer honor the results of an arbitration proceeding under Spielberg unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator" 103 L.R.R.M. at 1114. For a further discussion of *Suburban Motor Freight, see* note 27 *supra.*

The requirement set down in *Suburban Motor Freight* was discussed in Croation Fraternal Union, 232 N.L.R.B. 1010 (1977), where the Board stated its position was that where the resolution of the contract dispute will also resolve the unfair labor practice issue, deferral is proper upon a showing that the controversy falls within the contract's arbitration clause. 232 N.L.R.B. at 1014. *See* note 26 *supra.*

It is submitted that, in *Pincus,* deferral was improper since the unfair labor practice claim could not be resolved by an interpretation of the contract. The fact that the arbitrator did rule on the unfair labor practice issue does not defeat a claim against deferral, since the Board has exclusive jurisdiction over unfair labor practice claims under § 10(a). 29 U.S.C. § 160(a) (1976). As stated previously, the Board can defer to the arbitrator in such a case if it so chooses, but deferral is not required and where the Board disagrees with the arbitrator, the Board's ruling is controlling. Radio Television Technical School, Inc. v. NLRB, 488 F.2d at 461, *citing* Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964). *See* notes 47-52 and accompanying text *supra.* For the text of § 10(a), *see* note 13 *supra.*

81. *See* notes 26-29 and accompanying text *supra.* In *Pincus,* the sole issue was an unfair labor practice claim. 620 F.2d at 371. Richardson's argument was that she had been discharged for engaging in concerted activities. *Id.* The issue was not whether the complained-of conduct was permitted by the parties' contract, as is required for deferral to be proper. General Am. Transp. Co., 228 N.L.R.B. at 810 (Murphy, Chairman, concurring).

For a further discussion of *General American, see* notes 28-29 and accompanying text *supra.* For a further discussion of unfair labor practice claims, *see* notes 6 & 13 *supra.*

the settlement of labor disputes through arbitration,[82] but does not discuss the Board's decision not to follow the national policy when deferral to arbitration fails to provide adequate protection for employees' statutory rights.[83] Consequently, it is suggested that *Pincus* does not provide the protection for individual employees which the Board is required to provide under section 10(a).[84] Second, the court finds great importance in the voluntary nature of the arbitration process.[85] In resting its argument on *Collyer,* however, the court does not consider the possibility that, in statutory rights cases, an employee may not wish to seek his remedies through arbitration, and by thus requiring deferral the court actually forces an employee into the arbitration process.[86]

It is also submitted that in transferring greater power to the arbitrator, the *Pincus* court failed to consider many of the problems surrounding the arbitration process.[87] It is suggested that, although arbitrators may aid in the collective bargaining process,[88] the Board is capable of rendering more consistent judgments, can provide better fact finding procedures, and is more knowledgeable about industrial relations.[89] Also, while arbitrators may be more skilled in deciding

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82. 620 F.2d at 372. For a discussion of this policy, *see* notes 18-19 and accompanying text *supra.*

83. Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113, 1114 (1980). For a further discussion of *Suburban Motor Freight, see* note 27 *supra.*

84. *See* notes 13-20 and accompanying text *supra.*

85. 620 F.2d at 373.

86. A situation similar to this existed in General American Transp. Co., 228 N.L.R.B. 808 (1977). In *General American,* the employee thought that his pursuit of a remedy for his discrimination discharge would be futile. *Id.* at 808. In discussing the possibility of deferral, the Board stated:

> Were we to order deferral in these circumstanecs, there would be nothing voluntary about the arbitration to which [he] would be forced. Hence the voluntary nature of arbitration, long trumpeted by the *Collyer* enthusiasts as the main reason for deferral, is revealed as a sham in cases . . . where the charging party is an individual discriminatee seeking to enforce his individual rights.

Id. at 808-09. Consequently, the fact that the Union agrees to submit the dispute to arbitration should not foreclose the Board from reviewing the dispute. *Id.* at 808.

For a discussion of some of the problems surrounding the individual employee in arbitration, *see* note 29 *supra.*

87. *See* Murphy & Sterlacci, *supra* note 20, at 344.

88. *Id.* Arbitrators can aid in the collective bargaining process by eliminating the disruptive impact upon the process which results from Board intervention and by bringing in their purported expertise in deciding contract issues. *Id.* at 341. *See also* Samoff, *supra* note 19.

89. Getman, *supra* note 23, at 63. Professor Getman argues that the Board is better qualified to decide cases for four reasons: 1) the Board has better fact-finding procedures and investigatory resources; 2) the arbitrator usually knows only who the parties are, what the dispute concerns, and what the contract says, and he is normally unable to understand any of the practical

pure contract issues, some doubt exists as to their ability to decide statutory rights cases.[90] Therefore, it is suggested that deferral is inappropriate where unfair labor practices are involved, unless the Board is given some ultimate opportunity to review the legal issues raised by the case.[91] It is submitted that by failing to balance the merits of arbitration against the merit of Board decisions, the *Pincus* court disregarded an important part of the deferral issue and has effectively reduced the Board's powers without analyzing the possible effects of the reduction.

As a result of *Pincus,* it is suggested that the Third Circuit will refrain from giving full regard to the statutory powers delegated to the Board.[92] It is submitted that decisions requiring the Board to defer to an arbitration award could cause the erosion of the Board's jurisdiction in unfair labor practice cases,[93] the effect of which would be a lessening of employee protection and greater opportunities for employer abuse.[94]

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consequences of his interpretations; 3) the Board is a stable body and can reach consistent decisions on similar issues, while arbitration involves thousands of co-equal decisionmakers who rarely try to achieve consistency with one another; and 4) the Board is more familiar with its own rules and can more easily decide cases in a manner consistent with national labor relations policy. *Id. See also* Atleson, *supra* note 10.

90. *See* Belcher, *supra* note 19; Murphy & Sterlacci, *supra* note 20, at 344. Some doubt exists in this area because most arbitrators do not have any legal training, or any NLRB staff experience. Belcher, *supra,* at 819. Consequently, they may be asked to decide issues which they do not really understand. *Id.* There is also some concern as to the age of the arbitrators, as the majority of them are over 60 years old. *Id.* For a contrary view, *see* Covington, *supra* note 29, at 106-10.

91. This approach comports with current Board policy. *See* notes 21-29 and accompanying text *supra.* Also, after review, the Board can still defer if it so chooses, even in an unfair labor practice case. *See* notes 14-15 and accompanying text *supra.* If, however, the Board disagrees with the arbitrator's findings, it could set the award aside and its decision could only be overturned upon a showing that the decision is not supported by substantial evidence on the record as a whole or that the Board has abused its discretion. *See* notes 30-34 and accompanying text *supra.*

Applying these principles to *Pincus,* it is submitted that deferral is inappropriate, as the Board did review the case and did disagree with the arbitrator; yet the *Pincus* court overturned the decision simply on the ground that the arbitrator's decision was "arguably" correct. *See* 620 F.2d at 377.

92. *See* notes 13-15 and accompanying text *supra.*

93. Since the Board's jurisdiction is defined by statute and the national policy favoring arbitration is also stated in a statute, there must be some tension whenever the Board asserts its jurisdiction in refusing to defer to an arbitrator's award. Consequently, as long as the courts resolve the stiuation by deciding in favor of the national policy, the Board's jurisdiction over unfair labor practices, where arbitration is involved, is necessarily restricted.

For a discussion of the Board's statutory powers, *see* note 13 *supra.* For a discussion of the national policy favoring arbitration, *see* note 19 *supra.*

94. Without Board protection for employees, arbitration would be the only forum in which employees could have their grievances heard. The possibilities of injustice, such as where the Union refuses to prosecute a grievance, must then necessarily increase. This problem is compounded by the fact that there is limited review of an arbitrator's decision, and hence, little opportunity

It is suggested, however, that the effect of *Pincus* will be to force the Board to clearly state an alternate policy on deferral.[95] In this manner, the Board could retain its statutory power, as well as formulate a policy which allows parties to know when the Board will defer and which best complies with the purposes of the Act.[96]

In conclusion, it is submitted that, in requiring deferral, the Third Circuit has attempted to effectuate the national policy in favor of arbitration without giving due consideration to the other factors involved.[97] It is suggested that, in doing so, the court has unjustly infringed upon the Board's express duties to decide unfair labor practice issues.[98] Therefore, the Board should find it necessary to act in order to protect its jurisdiction, allowing the ultimate determination of the impact of *Pincus* to be delayed until the Board formulates a new policy regarding deferral.

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to correct any injustice which might occur. Murphy & Sterlacci, *supra* note 20, at 344-45. *See also* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (courts should not review the merits of the arbitrator's decision). This leaves the aggrieved employee with the only alternative of a suit against the union for breach of its duty of fair representation followed, if successful, by another suit against the employer for breach of the collective bargaining agreement under § 301 of the Act. *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Findley v. Jones Motor Freight, 106 L.R.R.M. 2420 (3d Cir., Jan. 21, 1981); R. GORMAN, *supra* note 13, at 695-98.

The injustice which is most likely to occur is in a case where there are different issues involved and the union's interests do not coincide with the individual employee's interests. Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113, 1114 (1980), *quoting* Schatzski, *supra* note 27, at 909. Where one of the issues has not been fully litigated or considered, the individual employee will be deprived of his individual rights. *Id.*

For a further discussion of employees' problems in arbitration, *see* note 29 *supra*.

95. An alternate policy would be necessary to remove any doubt as to the Board's actual position regarding deferral. *See* notes 21-29 and accompanying text *supra*.

96. *See* notes 17-19 and accompanying text *supra*.

97. *See* notes 78-91 and accompanying text *supra*.

98. *See* notes 13-20 and accompanying text *supra*.

EMPLOYMENT DISCRIMINATION — 42 U.S.C. § 1983 — WHERE A VALID CLAIM OF EMPLOYMENT DISCRIMINATION IS FOUND TO EXIST UNDER SECTION 1983, BACKPAY IS A PRESUMPTIVELY APPROPRIATE REMEDY.

Gurmankin v. Costanzo (1980)

In 1969, Judith Gurmankin, a blind woman who holds a professional certification from the Pennsylvania Department of Education as a teacher of comprehensive English, first attempted to obtain employment in the Philadelphia School District.[1] She was unsuccessful because the district's medical and personnel policy excluded blind teachers from teaching sighted students in the public schools.[2] Ms. Gurmankin was classified as having a "chronic or acute physical defect," [3] and was therefore prevented from taking the Philadelphia teacher's examination until the spring of 1974.[4] Ms. Gurmankin passed the examination,[5] but rejected the positions offered to her by the school district because they did not include retroactive seniority to which she claimed to be entitled.[6]

1. Gurmankin v. Costanzo, 626 F.2d 1115, 1118 (3d Cir. 1980).

2. Gurmankin v. Costanzo, 411 F. Supp. 982, 985 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977).

3. 411 F. Supp. at 985.

4. *Id.* The School District allowed the plaintiff to take the exam in the spring of 1974, when, after passage of federal and state legislation, discrimination against the handicapped was deemed to be unlawful. *Id.* *See* Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976); Act of December 19, 1974, P.L. 966, No. 318, § 1 (amending the Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, §§ 952-955 (Purdon Cum. Supp. 1975)).

The Rehabilitation Act of 1973 (Act) requires federal contractors and programs receiving federal financial assistance to take affirmative action to hire and promote qualified handicapped individuals. *See* 29 U.S.C. §§ 701-794 (1976). For a discussion of the affirmative action requirements of the Act, *see* Note, *Lowering the Barriers to Employment of the Handicapped: Affirmative Action Obligations Imposed on Federal Contractors,* 81 DICK. L. REV. 174 (1976).

The Pennsylvania Human Relations Act was amended in 1974 to prohibit discrimination by reason of handicap or disability. PA. STAT. ANN. tit. 43, § 952 (Purdon Cum. Supp. 1975). For further discussion of the Pennsylvania Human Relations Act, *see* note 26 *infra*.

5. 411 F. Supp. at 985. The plaintiff received a score of 82 on the written examination, ranking her 56th out of 164 exams taken, and a score of 72 on the oral exam, slightly higher than the minimum passing score of 70. *Id.*

The court found that the plaintiff had not been evaluated fairly because the grading of the oral exam had been based, in part, on "misconceptions and stereotypes about the blind" and their teaching ability. *Id.* at 987-88. Also, there was evidence, established by testimony of the Director of Personnel for the school district that, although the plaintiff was permitted to take the test, at the time of trial on May 5, 1975, current policy included "a restriction on the blind teaching the sighted." *Id.* at 986.

6. *Id.* at 988. The plaintiff was not qualified for one of the offered positions, that of a music teacher. *Id.* Another position was at a disciplinary

Ms. Gurmankin filed suit in the district court for the Eastern District of Pennsylvania in November 1974,[7] pursuant to section 1983 of the Civil Rights Act of 1871 (section 1983),[8] alleging that the school district's policy of preventing blind teachers from teaching sighted students was unconstitutional.[9] In its March 31, 1976 opinion, the district court ordered that she be offered employment with seniority retroactive to September 1970.[10] More than ten months later, in a supplemental proceeding, the district court found that the school district had failed to comply with the original order.[11] A supplemental order was entered February 8, 1977 requiring the school district to provide the appellant with a position at one of six designated schools.[12] Both orders were affirmed by the United States Court of Appeals for the Third Circuit.[13]

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boys school which the district and her guidance counselor advised her not to take. *Id.*

7. 626 F.2d at 1118.

8. 626 F.2d at 1118. *See;* 42 U.S.C. § 1983 (1976). This section provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

Id. For further discussion of § 1983, *see* notes 40-57 and accompanying text *infra.* For a general discussion of § 1983 and its use in employment discrimination litigation, *see* Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination,* 62 CORNELL L. REV. 258 (1976); *LeGette, 42 U.S.C. § 1983: Claims Against the State for Damages,* 7 FLA. ST. U.L. REV. 526 (1979).

9. 411 F. Supp. at 983. The court held that refusing to consider blind applicants for teaching positions solely on the basis of their physical handicap constituted an irrebutable presumption of physical incompetency which violated the fourteenth amendment's due process clause. *Id.* at 988.

For criticism of the application of the irrebutable presumption doctrine to *Gurmankin, see* Note, *Applying the Constitutional Doctrine of Irrebutable Presumption to the Handicapped* — Gurmankin v. Costanzo, 27 DEPAUL L. REV. 1199 (1978); Note, *Constitutional Law — Irrebutable Presumption Doctrine — Right of Blind Teacher to Take Teacher's Examination,* 23 WAYNE L. REV. 1295 (1977).

For an analysis of the irrebutable presumption doctrine, *see generally* Simson, *The Conclusive Presumption Cases: The Search for a Newer Equal Protection Continues,* 24 CATH. U.L. REV. 217 (1975); Comment, *Irrebutable Presumptions An Illusory Analysis,* 27 STAN. L. REV. 449 (1975); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?,* 72 MICH. L. REV. 800 (1974).

10. 411 F. Supp. at 993. The court reserved decision on the plaintiff's requests for backpay and attorney's fees. *Id.* at 989. For a discussion of the district court's reasoning, *see* notes 58-60 and accompanying text *infra.*

11. 626 F.2d at 1118. Ms. Gurmankin still had not received an offer of employment at an "attractive" high school in compliance with the injunction's seniority provision. *Id.*

12. *Id.*

13. Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977).

In another supplemental order, the district court denied the plaintiff backpay and tenure from 1970 to the date of its original decision, March 31,1976, granting only frontpay from that time.[14] Ms. Gurmankin appealed this decision as an abuse of discretion.[15] The Third Circuit[16] affirmed the district court's denial of tenure,[17] but vacated that portion of the order which denied the request for backpay for the period prior to March 31, 1976, *holding* that plaintiffs in employment discrimination suits, brought under section 1983, are presumptively entitled to an award of backpay to make them whole. *Gurmankin v. Costanzo,* 626 F.2d 1115 (3d Cir. 1980).

Individuals with physical or mental handicaps are very often denied equal opportunities, particularly in employment.[18] As one court stated in reference to a blind job applicant,

> [t]he blind person in our society seems to be burdened with a double handicap. The first handicap — loss of physical sight — does not appear, however, to present as great an obstacle as the second — society's lack of vision as to the capacity of a blind

14. Gurmankin v. Marcase, No. 74-2980 (E.D. Pa. Feb. 5, 1980). The lower court also denied the plaintiff's motion for class certification, but granted her motions requesting seniority, credit for sick and personal days, contributions by school district to the pension fund to be back dated September, 1970, and all other benefits accruing to a fulltime, regularly employed secondary school English teacher with the School District of Philadelphia to accrue as of September 1, 1980. *Id.*

15. 626 F.2d at 1118. Ms. Gurmankin asserted that she was entitled to backpay for the entire period during which her constitutional rights were violated. *Id.*

16. The case was heard by Chief Judge Seitz, and Judges Garth and Sloviter. Judge Sloviter wrote the majority opinion in which Chief Judge Seitz joined. Judge Garth filed a separate opinion concurring in part and dissenting in part.

17. 626 F.2d at 1126. The appellant claimed that the court had erred as a matter of law in holding that it was without power to award tenure and had abused its discretion in the denial of this relief. *Id.* at 1125. The appellant relied on Kunda v. Muhlenburg College, 621 F.2d 532 (3d Cir. 1980), a Title VII case, in which the Third Circuit had held that tenure could be awarded under appropriate circumstances, and affirmed the district court's tenure award. *Id.* at 1121, *citing* Kunda v. Muhlenburg College, 621 F.2d 532 (3d Cir. 1980). However, in *Kunda,* the teacher's achievements and qualifications were not in dispute and the court, therefore, held that it was not interfering with academic determinations in awarding Kunda tenure. 621 F.2d at 549. The appellant in the instant case, however, requested that the trial court grant tenure without having given the school district an opportunity to evaluate her qualifications and performance as a teacher. 626 F.2d at 1125. The *Gurmankin* court determined that this would be putting the appellant in a better position than she would have been absent the constitutional violation and therefore affirmed the district court's denial of tenure. *Id.* at 1125-26.

18. Recent "official" statistics on unemployment among the handicapped will not be available until the 1980 census compilation is completed. "Unofficial" reports indicate there is a high rate of unemployment among the handicapped. *See, e.g.,* Lublin, *Lowering Barriers,* Wall St. J., Jan. 27, 1976, at 1, col. 1.

> individual to enjoy a full and meaningful life despite the loss of physical sight.[19]

The handicapped are not protected against employment discrimination by Title VII of the Civil Rights Act of 1964, which limits its coverage to discrimination based on race, color, sex, religion and national origin.[20]

In response to the needs of the handicapped, Congress has enacted several types of protective legislation — for example, the Rehabilitation Act of 1973 [21] and the Civil Service Act [22] — both of which provide for the establishment of affirmative action programs to hire and advance handicapped individuals.[23] The Fair Labor Standards Act [24] — encourages employers to pay handicapped workers at a rate lower than other workers in order to prevent curtailment of employment opportunities.[25] Many states have also passed laws which prohibit employment discrimination against the handicapped although the statutes vary in scope among the states.[26] However, none of these statutes provides the broadbased protection against employment discrimination against the handicapped that Title VII provides for other minorities.[27]

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19. Hoffman v. Ohio Yough Comm'n, 13 Fair Empl. Prac. Cas. 30, 35 (N.D. Ohio 1975).

20. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976) (originally enacted as Pub. L. No. 88-352, § 703, 78 Stat. 255). For a discussion of the possibility of extending Title VII to the handicapped, *see* Note, *Equal Employment and the Disabled,* 10 COLUM. J. LAW & SOC. PROB. 457 (1974). For further discussion of the protections afforded by Title VII, *see* note 27 *infra.*

21. 29 U.S.C. § 701 (1976).

22. *Id.* § 791 (1976).

23. Under the Rehabilitation Act of 1973, government contractors and agencies must maintain affirmative action programs to hire and promote qualified handicapped individuals. *Id.* § 793.

The Civil Service Act requires federal departments, agencies and instrumentalities to establish affirmative action programs for hiring, placement, and advancement of handicapped individuals. *Id.* § 791.

24. 29 U.S.C. § 214(c)(1) (1976). Although this Act encourages employers to pay handicapped workers at a rate lower than other employees, the employer must be prepared to justify the lower rate on the basis of lower productivity. *Id.* The statute is designated to stimulate the employment of handicapped persons whose handicap affects their productivity so that their employment would not be otherwise justifiable. 4 A. LARSON, EMPLOYMENT DISCRIMINATION, § 107.20 (1978).

25. 29 U.S.C. § 214(c)(1) (1976).

26. *See* 4 A. LARSON, *supra* note 24, §§ 108.00-.10 (1978). An example of a state statute prohibiting discrimination is the Pennsylvania Human Relations Act which prohibits discrimination against the handicapped. PA. STAT. ANN. tit. 43, § 2 (Purdon Cum. Supp. 1975). This statute deems it unlawful to deny equal employment to handicapped individuals, unless based upon a bona fide occupational qualification. *Id.* The employer must determine whether the handicap substantially interferes with the ability to perform the essential function of the employment and to do so he must inquire beyond the mere existence of the handicap. *Id.*

27. 4 A. LARSON, *supra* note 24, § 104.20 (1978). In 1964, Congress passed a Comprehensive Civil Rights Act (Act) of which Title VII is a part. *See* 42

Backpay awards in Title VII cases have a sound statutory basis as backpay is expressly included in the remedial section of the act as an equitable remedy.[28] In wrongful discharge cases, backpay is also justified on the theory of compensatory contract recovery.[29] Therefore, the determination of legal damages, including backpay, is a breach of contract determination, and no exercise of judicial discretion need come into play in fashioning a remedy.[30]

The Eighth Circuit, in *United States v. N.L. Industries, Inc.*,[31] a Title VII case, characterized a backpay award in employment discrimination cases as having a dual role, i.e., a compensatory role in providing tangible monetary relief for the economic loss, and an equitable role in acting as a deterrent to other employers.[32] The major function of the Title VII backpay award is to help effectuate the express congressional purpose of Title VII, which is to make the victims of unlawful discrimination whole.[33]

U.S.C. §§ 2000e-2000e-17 (1976). The entities subject to the Act are employers, employment agencies, and labor organizations. *Id.* § 2000e-2. All individuals are protected from certain types of discrimination: Employers cannot refuse to hire and cannot discharge or otherwise discriminate because of an individual's race, color, religion, sex or national origin. *Id.* § 2000e-2. It is unlawful for an employer to utilize these criteria to segregate or classify employees or applicants in a way that tends to deprive them of employment opportunities. *Id.* § 2000e-2(a)(2). The remedial power of the courts is set forth in § 2000e-5: "The court may enjoin the respondent . . . and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate". *Id.* § 2000e-5(g).

For a general description of laws affecting the handicapped *see* 4 A. LARSON, *supra* note 24, §§ 107.00-108.20 (Cum. Supp. 1979); Lang, *Employment Rights of the Handicapped,* 11 CLEARINGHOUSE REV. 701 (1977). *See generally* Burgdorff & Burgdorff, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause,* 15 SANTA CLARA LAW. 855 (1975); Sorkin, *Equal Access to Equal Justice: A Civil Right for the Physically Handicapped,* 78 CASE & COM. 41 (Mar.-Apr. 1973).

For an analysis of the position of the handicapped in the job market as anologized to racial minorities, *see* Kriegel, *Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro,* 38 AM. SCHOLAR 412 (1969).

28. 42 U.S.C. § 2000e-5(g) (1964) (amended 1972). For a discussion of Title VII, *see* note 27 and accompanying text *supra.*

29. *See* Leathers v. Martin Cty. Bd. of Educ., 65 F.R.D. 68, 70 (E.D.N.C. 1974). For a discussion of *Leathers, see* note 87 and accompanying text *infra.*

30. *Id.*

31. 479 F.2d 354 (8th Cir. 1973).

32. 479 F.2d at 379, *citing* Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir. 1971). The court noted that the equitable purpose of deterrence was the most important purpose. *Id.*

33. 118 CONG. REC. 7168 (1972). The purpose of the backpay award is:

> to make the victims of unlawful discrimination whole, and . . . the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a posi-

In *Albermarle Paper Co. v. Moody*,[34] the United States Supreme Court established a presumptive right to backpay as a remedy for discrimination in violation of Title VII.[35] *Albermarle* was a class action involving the class of present and former black employees at a North Carolina paper mill.[36] The class challenged as discriminatory the plant's seniority system and employment testing program and requested a backpay award.[37] The Court stated that when a wrong has been done "the compensation shall be equal to the injury," [38] and established a presumption in favor of backpay awards to accomplish this goal.[39]

Although section 1983 reaches employment discrimination at the state and municipal levels,[40] relatively little attention has been given

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tion where they would have been were it not for the unlawful discrimination.

Id.

34. 422 U.S. 405 (1975).

35. *Id.* at 419.

36. *Id.* at 408.

37. *Id.* at 409.

38. *Id.* at 418-19, *quoting* Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867). Backpay is awarded to deter would-be discriminators as well as to provide meaningful relief to the victims of illegal discrimination. 422 U.S. at 418.

39. 422 U.S. at 419. The *Albermarle* Court also noted that it is the historic purpose of equity to secure complete justice. *Id., citing* Brown v. Swann, 35 U.S. (10 Pet.) 497, 503 (1836). The court further stated that where a legal injury is economic in nature, the injured party must be placed, as near as possible, in the position he would have been had it not been for the wrong committed. 422 U.S. at 418-19, *citing* Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867).

The court examined the purpose of Title VII, *i.e.*, to make persons whole for injuries suffered as a result of unlawful employment discrimination and to eradicate discrimination throughout the economy. 422 U.S. at 417-18. The court held that backpay should be denied only for sufficient reasons which would not frustrate these purposes, but did not specify what would constitute a sufficient reason. *Id.* at 421.

40. District of Columbia v. Carter, 409 U.S. 418 (1975) (§ 1983 is of limited scope and applicable only to state action). *See* Monroe v. Pape, 365 U.S. 167, 181-85 (1961) (holding that a cause of action to recover damages from police officers could be maintained under § 1983).

The jurisdictional basis for § 1983 is provided for in 28 U.S.C. § 1343(3) (1976). Section 1343(3) states in pertinent part:

> The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any persons:
>
> . . . .
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of any persons within the jurisdiction of the United States.

Id.

Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act, Act of April 20, 1871, ch. 22 § 1, 17 Stat. 13. By its terms § 1983 reaches only persons acting under color of state law. *See* 42 U.S.C. § 1983 (1976). The statute does not reach purely private conduct. *Id.* This statute was passed after the Civil War to give force and effect to the newly ratified fourteenth amendment which provides that "[n]o State shall make

to the use of the Civil Rights Act of 1871 as a proscription against employment discrimination.[41] Consequently, backpay awards in section 1983 employment discrimination cases is a fairly new concept.[42] Backpay, however, has been awarded in other types of section 1983 claims, particularly maternity leave cases in which public school teachers have been awarded backpay from school districts.[43] Courts have also awarded backpay to other public employees for violations of their constitutional rights,[44] but none of these cases spoke in terms of a presumption in favor of backpay.[45]

Prior to the instant case, other circuits had discussed the issue of backpay awards in a section 1983 action.[46] In *Harkless v. Sweeney Independent School District*,[47] the Fifth Circuit found backpay to be an integral aspect of equitable relief to be awarded under section 1983 in a wrongful discharge action against a school district.[48] *Harkless* was an action brought by black school teachers against a school district and

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or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

For a discussion of the history of § 1983, *see* B. SCHLEI AND P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976).

41. *See* Brooks, *supra* note 8, at 259. Litigation under § 1983 can be an extremely useful method of combating employment discrimination as the action is not limited in several significant areas as a Title VII action would be. *Id.* at 260.

A Title VII action must be filed within 180 days after the discriminatory event, or within 30 days if the plaintiff is a federal employee. *See* 42 U.S.C. §§ 2000e-5(c), 2000e-5(f)(1), 2000e-16(c) (1976). However, a cause of action under § 1983 runs as long as the applicable state statute of limitations. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975).

Also, punitive damages may be recovered under § 1983. Mansill v. Saunders, 372 F.2d 573, 576 (5th Cir. 1967). For an in depth analysis of the use of the Civil Rights Acts in employment discrimination actions, *see* Brooks, *supra*. For a discussion of backpay awards under § 1983 employment discrimination claims, *see* notes 47-57 and accompanying text *infra*.

42. *See* Brooks, *supra* note 8, at 259.

43. *See, e.g.*, Paxman v. Wilkerson, 390 F. Supp. 442 (E.D. Va. 1975) (unrebuttable presumption of unfitness violates due process and the teachers are entitled to backpay relief); Health v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972) (pregnant teachers must be provided with a case-by-case determination of inability to work, awarding full reinstatement including backpay).

44. *See e.g.*, Burt v. Board of Trustees, 521 F.2d 1201 (4th Cir. 1975) (discharge of school teacher was denial of due process which supported an award of backpay); Ramsey v. Hopkins, 447 F.2d 128 (5th Cir. 1971) (public employee whose employment was terminated in violation of his constitutional rights was entitled to back wages); Vega v. Civil Serv. Comm'n, 385 F. Supp. 1376 (S.D.N.Y. 1974) (summary dismissal of public employee is 14th amendment violation and plaintiff is entitled to retroactive backpay).

45. *See* notes 43 & 44 *supra*.

46. *See* notes 47-57 and accompanying text *infra*.

47. 427 F.2d 319 (5th Cir. 1970).

48. *Id.* at 323-24.

the trustees and superintendent of the district for alleged violations of the teachers' civil rights by not renewing their teaching contracts when the schools were desegregated.[49] The district court had ordered a jury trial to adjudicate the merits of the plaintiff's request for a backpay award.[50] The appellate court held that backpay was an integral part of an equitable action for reinstatement authorized by section 1983 and was, therefore, not for jury consideration.[51]

The Tenth Circuit, in *Bertot v. School District No. 1*,[52] also awarded backpay in a section 1983 case, stating that "under 1983, as under Title VII, there is 'nothing' on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between these two remedies." [53] *Bertot* involved a claim by a public school teacher against a school district and district officials, alleging that the district had unlawfully refused to renew her teaching contract because she had exercised her first amendment right by publicly taking a position contrary to the policy of the school district regarding the school dress code.[54] The defendants argued that because they had acted in good faith and without malice, they were immune from a section 1983 backpay claim.[55] The court held that an award of backpay is an element of equitable relief, and equitable relief is not precluded by a good faith defense.[56] The *Bertot* court felt that a manifest injustice would result if the plaintiff were not fully compensated for the unconstitutional nonrenewal of her contract and that a backpay award was necessary to avoid this injustice.[57]

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49. *Id.* at 319. The district court, after a full jury trial, granted the defendant's motion to dismiss for failure to state a claim because the municipal defendant could not be sued under § 1983 as municipalities were not "persons" within the meaning of § 1983. *Id.* at 320-33. The appellate court reversed and remanded, holding that the school district was included within the meaning of the word "person" in § 1983 for the purpose of the equitable relief sought. *Id.* at 323.

50. *Id.* at 320.

51. *Id.* at 324. The court noted that the purpose of the equitable remedy of injunctive reinstatement was to return the plaintiffs to the position held before the alleged unconstitutional failure to renew their contracts. *Id.*

52. 613 F.2d 245 (10th Cir. 1979).

53. *Id.* at 250, *quoting* Albermarle Paper Co. v. Moody, 422 U.S. at 423.

54. Bertot v. School District No. 1, 522 F.2d 1171, 1178 (10th Cir. 1975) (prior opinion).

55. *Id.*

56. 613 F.2d at 250. The court stated that there is nothing on the face of § 1983 that justifies the creation of drastic distinctions between injunctive and backpay relief. *Id.*, citing Albermarle Paper Co. v. Moody, 422 U.S. at 423.

57. 613 F.2d at 252. The court noted that § 1983 has, as its core, a "concern for fundamental fairness between a powerful government and the individual." *Id.*

The Supreme Court has established that constitutional violations must be remedied. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *See also* Bell v. Hood, 327 U.S. 678 (1946). In *Bell,* the Court stated: "[W]here federally protected rights have been in-

Against this background, the Third Circuit began its discussion of *Gurmankin* by stating that meaningful appellate review of the district court's exercise of discretion required consideration of the basis on which the trial court had acted.[58] A review was then made of the analysis used by the district court in denying the backpay award.[59] Central to the district court's decision was its belief that the policy considerations underlying Title VII were very different from the policy considerations in the instant case.[60] Rejecting this conclusion,[61] the Third Circuit noted that, while it was not necessary to assume parity of remedy between all Title VII and section 1983 cases,[62] this case, one of "discrimination in employment based on stereotypical notions of ability in violation of the constitutional imperative to be judged on an individual basis . . . requires equitable remedies comparable to those deemed appropriate in Title VII employment discrimination cases." [63]

The Third Circuit also disagreed with the weight given by the district court to the school district's good faith and lack of notice as factors in its determination not to award backpay.[64] The court cited *Albermarle* [65] and *Owen v. City of Independence,*[66] for the proposi-

vaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 684.

58. 626 F.2d at 1119. The court noted that in reviewing the district court's exercise of its discretion in denying equitable relief, it must tread a path between substituting its own judgment and an automatic stamp of approval. *Id.* But it noted that the reviewing court has an obligation to require that the exercise of discretion be in accordance with "what is right and equitable under the circumstances and the law." *Id.* at 1120, *citing* Langness v. Green, 282 U.S. 531, 541 (1931).

59. 626 F.2d at 1120.

60. *Id.* For a discussion of the policy considerations of Title VII, *see* notes 33-38 and accompanying text *supra.*

61. 626 F.2d at 1120. The court stated that this conclusion was considered and rejected by it in the first appeal of this case. *Id.* The court also stated that there was no distinction in the law of equitable remedies between suits brought under Title VII and suits brought under § 1983. *Id.* at 1121, *citing* Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir.), *vacated on other grounds,* 414 U.S. 970 (1973).

62. 626 F.2d at 1121. For a discussion of Title VII and § 1983, *see* notes 27 & 40 *supra.*

63. 626 F.2d at 1121.

64. *Id.* at 1122. The school district contended that the imposition of a backpay award was not fair as it did not have notice that its conduct was unconstitutional, because the applicable Pennsylvania statute permits each school district to establish fitness standards for employment. *Id. See* PA. STAT. ANN. tit. 24, § 21-2108 (Purdon 1962).

The Third Circuit characterized the trial court's use of the school district's good faith as a significant, and possibly the decisive factor, in its determination not to award backpay. *Id.* The court cited *Albermarle* as the Supreme Court's decree that bad faith is not a factor in determining whether backpay should be awarded for employment discrimination. *Id., citing* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). For a discussion of *Albermarle, see* notes 34-39 and accompanying text *supra.*

65. 422 U.S. at 422-23.

66. 445 U.S. 622 (1980). In *Owen,* the Supreme Court resolved the dispute that had arisen regarding the good faith of municipal employees by holding

tion that backpay is compensation for injury, not a punishment for moral turpitude and, therefore, bad faith is not a factor to be considered in deciding whether a backpay award should be ordered.[67]

The final reason given by the trial court for its denial of backpay was its reliance on the Supreme Court's recent decision in *City of Los Angeles v. Manhart*.[68] In *Manhart*, the Supreme Court reversed an award of retroactive relief for a sex discrimination claim,[69] finding that the enormous financial impact which retroactive relief would have caused was an unusual circumstance which rebutted the retroactive relief presumption.[70] The Third Circuit found reliance on *Manhart* unpersuasive in the instant case as the award of backpay to one teacher would not have a major financial impact on the school district.[71] Nor did the court find persuasive the argument that backpay should not be awarded because it would be paid from public funds.[72] It noted that the same is true of any award against the school district since it is the public at large which is ultimately responsible for the district's administration.[73]

The court found that the trial court's considerations were insufficient, in light of the underlying policy[74] and precedent of section 1983,[75] to deny a backpay award.[76] It noted that the trial court's prior

that the municipality enjoyed no qualified immunity from liability under the Civil Rights Act based on the good faith of the city officials. *Id.* at 638.

67. 626 F.2d at 1122. The court implicitly applied the *Albermarle*-Title VII reasoning to the case at bar, a § 1983 case. *Id.* For a discussion of *Albermarle, see* notes 34-39 and accompanying text *supra*.

68. 435 U.S. 702 (1978).

69. *Id.* at 720.

70. *Id.* at 721. In *Manhart*, female employees of the Los Angeles Department of Water and Power had challenged the requirement that female employees make larger contributions to the pension fund than male employees. *Id.* at 705. The Supreme Court affirmed the holding that the requirement violated Title VII, but vacated the award of retroactive relief. *Id.* at 721.

The *Manhart* Court stated that "retroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties." *Id.* at 722-23.

71. 626 F.2d at 1124.

72. *Id.* The court noted that whenever any public entity incurs liability the cost is ultimately borne by "innocent" third parties. *Id.*

73. *Id. See generally* Le Gette, *supra* note 8, at 525. In *Owen*, the Supreme Court held that a municipality enjoyed no qualified immunity from liability under the Civil Rights Act and rejected the argument that damages should not be paid from the public treasury. 445 U.S. at 638, 654. *See* note 66 *supra*. The *Owen* Court found it fairer to have the loss borne by all the taxpayers than to allow its impact to be felt solely by those whose rights were violated. *Id.*

74. For a discussion of the policy of § 1983, *see* notes 41-42 and accompanying text *supra*.

75. For a discussion of the case law concerning backpay awards under § 1983, *see* notes 43-57 and accompanying text *supra*.

76. 676 F.2d at 1124. The court noted that, as a result of the discriminatory actions of the school district, the appellant was effectively unemployed for

determination that the appellant was entitled to have been employed as of September 1970 had little meaning unless she was entitled to backpay for that period.[77]

Judge Garth, while concurring in the denial of tenure,[78] dissented from the backpay award arguing that the court had assumed Congress' legislative role.[79] He asserted that the majority had, for all practical purposes, held that the presumption of backpay, formerly applied only to Title VII [80] and age discrimination cases,[81] must now be applied to section 1983 cases as well.[82] He contended that the Supreme Court has read into Title VII a presumption of backpay in order to effectuate a specific congressional purpose, *i.e.*, to eradicate discrimination based on race, religion, sex, and alienage.[83] However, as Congress has not enunciated a similar purpose towards the handicapped, the traditional sound discretion of the district court to award, or not award, retroactive relief should not be burdened by the imposition of a presumption.[84]

Judge Garth also found the cases which the majority cited for support [85] to be equivocal, as they were primarily wrongful discharge

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the entire period for which she sought backpay. *Id.* The court found no facts or circumstances, relating to the appellant, cited by the appellee or by the trial court, which would militate against the exercise of the trial court's discretion in her favor. *Id.*

The court also noted that a backpay award has a two-fold purpose, *i.e.* to deter would-be discriminators and to provide meaningful relief to the victims of the discrimination. *Id.* at 1120. Therefore, the court reasoned that without a backpay award, the victims of discrimination could not be effectively compensated. *Id.* at 1121. The restoration of the victim as fully as possible to the economic position in which she would have been absent the discrimination was recognized by the Court as the proper standard of relief. *Id.*

77. *Id.* at 1124.

78. *Id.* at 1126 (Garth, J., concurring in part and dissenting in part).

79. *Id.* (Garth, J., concurring in part and dissenting in part).

80. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir.), *vacated on other grounds,* 414 U.S. 970 (1973). For a discussion of *Albermarle, see* notes 34-39 and accompanying text *supra.*

81. *See* Rodriquez v. Taylor, 569 F.2d 1231 (3d Cir. 1977) (Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634). Judge Garth stated that it is appropriate to invoke the presumption of backpay in these cases because they fall under a statute whose purposes parallel that of Title VII. 626 F.2d at 1127 (Garth, J., concurring in part and dissenting in part).

82. 626 F.2d at 1126 (Garth, J., concurring in part and dissenting in part).

83. *Id.* at 1127 (Garth, J., concurring in part and dissenting in part). Judge Garth admitted that discrimination on the basis of disability may be every bit as onerous as discrimination on the basis of the enumerated Title VII characteristics but asserted that the situations are distinguishable in that Congress did not include the disabled in the Title VII list of protected classes. *Id.*

84. *Id.* Judge Garth concluded that the comprehensive post-Civil War legislation cannot be analogized to the Title VII statutes of the mid-sixties because in no prior case has the Supreme Court held the presumption of retroactive relief was applicable to a general § 1983 action. *Id.*

85. For a discussion of these cases, *see* notes 47-57 and accompanying text *supra.*

cases and not failure to hire cases as was *Gurmankin*.[86] He concluded that backpay in wrongful discharge cases can be justified on a theory of compensatory contract recovery, a theory which is inapplicable to this refusal to hire case.[87] Judge Garth analyzed the district court's decision and concluded that it had credited the appellant with every benefit of every doubt,[88] recognizing that backpay would be required to make the appellant whole.[89] But, in the proper exercise of its discretion, the district court had found enough unusual circumstances[90] to appropriately limit its award of backpay to that period for which the school district's bad faith was dispositive of the equitable considerations.[91]

The most compelling argument against the Third Circuit's analysis, it is submitted, is its almost total analogy to Title VII case law.[92] In the absence of a general congressional mandate to prohibit discrimination against the handicapped, it is reasonable to conclude that the Civil Rights Acts cannot be analogized to Title VII.[93] It is suggested, however, that while Title VII and the Civil Rights Acts were passed for

86. 626 F.2d at 1128 (Garth, J., concurring in part and dissenting in part). Judge Garth also discussed the fact that this was not a wrongful discharge case but a failure to hire case. *Id.* at 1129 (Garth, J., concurring in part and dissenting in part). This is a distinction which he found significant in light of the Commonwealth's policy of permitting school districts to establish their own physical fitness qualifications. *Id.* *See* PA. STAT. ANN. tit. 24, § 21-2108 (Purdon 1962).

87. 626 F.2d at 1128 (Garth, J., concurring in part and dissenting in part), *citing* Leathers v. Martin County Bd. of Educ., 65 F.R.D. 68, 69-70 (E.D.N.C. 1974). In *Leathers,* the court, in analyzing whether or not the appellant had a right to a jury trial, found it difficult to characterize backpay as an equitable remedy as it could be awarded as damages in a court of law. 65 F.R.D. at 70.

88. 626 F.2d at 1129-30 (Garth, J., concurring in part and dissenting in part). Judge Garth asserted that the district court drew upon cases which had applied a presumption when analyzing the plaintiff's case, even though her claim did not entitle her to such a presumption. *Id.*

89. 626 F.2d at 1130 (Garth, J., concurring in part and dissenting in part). In fact, Judge Garth noted that the district court, in exercising its discretion, had balanced a presumption in favor of backpay, against the absence of the other factor that usually serves to justify backpay, a legislative pronouncement against future violations. *Id.* Judge Garth also asserted that the district court had credited the plaintiff with the benefit of all doubts and drew upon cases which applied a backpay presumption. *Id.*

90. Judge Garth found the situation in the instant case, where discrimination against a blind teacher was found in an educational setting, by a School Board, and in the absence of bad faith to be a unique circumstance. *Id.* at 1130 (Garth, J., concurring in part and dissenting in part).

91. *Id.* at 1131 (Garth, J., concurring in part and dissenting in part). For a discussion of the good faith arguments, *see* note 64 *supra.*

92. 626 F.2d at 1126-29 (Garth, J., concurring in part and dissenting in part).

93. *See id.* at 1127. (Garth, J., concurring in part and dissenting in part). Judge Garth asserted that the Supreme Court has read into Title VII a presumption of backpay in order to effectuate the congressional decision to tip the scales against employers who persist in creating the egregious economic problems to which Title VII was a response. *Id.* *See* notes 83-84 and accompanying text *supra.*

different purposes, both were designed to combat discrimination.[94] Although they cannot and should not be analogized in all areas, it is submitted that when discrimination violative of either is present, the remedy must be to afford the most complete relief possible.[95] As the Supreme Court held in *Monell v. Department of Social Services*,[96] "[t]here can be no doubt that § 1 of the Civil Rights Act . . . was intended to provide a remedy to be broadly construed against all forms of official violation of federally protected rights." [97] Where the injury is economic, the general rule is that when a wrong is done the compensation should be equal to the injury.[98]

The presumption of backpay, established by the majority,[99] does not make backpay a mandatory remedy; but unusual circumstances would be required to deny a backpay award.[100] Although the district court found that lack of notice and good faith of the school district to be the requisite unusual circumstances,[101] it is submitted that lack of notice and good faith should not weigh against a backpay award. Irrespective of the school district's notice and motive, the appellant has sustained a loss and to deny a backpay award on this basis would deny her make-whole relief.[102] Backpay is not a penalty imposed against the school district for a bad decision, nor is it a punishment.[103] Therefore, it is suggested that motive is logically irrelevant to a determination of whether backpay is justified.

While the cases cited by the majority are distinguishable from the instant case in that they are wrongful discharge cases rather than failure to hire cases,[104] it is suggested that this distinction is not a convincing one. Although in wrongful discharge cases backpay can be justified as compensatory,[105] it is submitted that a backpay award, even in wrongful

94. For a discussion of the purposes of Title VII and § 1983, *see* notes 27 & 40 *supra*.

95. Congress, in the language of § 1983, expressly empowered courts to entertain a suit in equity to redress the plaintiff for the deprivation of any rights, privileges and immunities secured by the Constitution. *See* 42 U.S.C. § 1983 (1972); note 8 *supra*.

96. 436 U.S. 658 (1978).

97. *Id.* at 700-01.

98. Albermarle Paper Co. v. Moody, 422 U.S. at 418, *citing* Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867).

99. 626 F.2d at 1120.

100. *See* notes 69-70 and accompanying text *supra*.

101. *See* notes 66-67 and accompanying text *supra*. The district court found unusual circumstances in the good faith of the school district, the absence of a congressional mandate against handicapped discrimination, and the Pennsylvania statute permitting school districts to establish physical fitness qualifications. *See* 626 F.2d at 1130.

102. *See* note 33 *supra*.

103. *See* United States v. N.L. Indus., Inc., 479 F.2d at 379, *citing* Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir. 1971).

104. For a discussion of this aspect of the opinion, *see* notes 85-87 and accompanying text *supra*.

105. *See* notes 29-30 and accompanying text *supra*.

discharge cases, cannot be seen as devoid of any equitable function.[106] Backpay serves a major remedial purpose of restoring the plaintiff to his proper and lawful employment status.[107] It also has another equitable purpose, that of an indirect prospective effect by deterring the same conduct in the future.[108] Thus, it is submitted that the more reasoned view is that backpay is, in addition to its compensatory function, an integral portion of equitable relief. Indeed, in Title VII, Congress expressly included backpay among the *equitable* remedies available under the Act.[109]

Because it is an equitable remedy, a court will use its discretion in awarding backpay.[110] This discretion must be exercised so as to comport with the historic purpose of equity to secure complete justice.[111] Equitable remedies in section 1983 should also be awarded so as to satisfy the basic concern of the statute, fundamental fairness,[112] and to satisfy the mandate of *Bell v. Hood,*[113] *i.e.,* for courts to adjust remedies so as to grant the *necessary* relief.[114] Therefore, as the plaintiff could not be made whole without backpay, it is submitted that "fundamental fairness" requires a backpay award, absent unique circumstances. Without make-whole relief, the victims of past constitutionally unlawful discrimination will not be restored to their rightful economic status.[115] The majority's fashioning of a presumption in favor of backpay, it is suggested, is an appropriate technique to achieve these goals.

In considering the impact of *Gurmankin,* it is submitted that a presumption in favor of backpay is an expansion of the law of section 1983.[116] In light of the fact that a presumption of backpay in section

106. For a discussion of the purpose of a Title VII backpay award, *see* note 33 *supra.*

107. *See* note 76 and accompanying text *supra.*

108. United States v. N.L. Indus., Inc., 479 F.2d at 379. For a discussion of the deterrent effect of backpay, *see* note 32 and accompanying text *supra.* The Eighth Circuit has stated that backpay awards provide the catalyst which causes employers to self-evaluate their own practices and endeavor to eliminate discrimination. 479 F.2d at 379. Consistent backpay awards, the court reasoned, will cause companies to find it in their best interests to remedy discriminatory procedures without court intervention. *Id.*

109. *See* 42 U.S.C. § 2000e-5(g) (1964) (amended 1972); note 28 and accompanying text *supra.*

110. *See* notes 28-30 and accompanying text *supra.*

111. *See* Brown v. Swann, 35 U.S. (10 Pet.) 497, 503 (1836). For a discussion of this point, *see* note 39 and accompanying text *supra.*

112. *See* Bertot v. School Dist. No. 1, 613 F.2d at 252.

113. 327 U.S. 678, 684 (1946). For a discussion of *Bell, see* note 57 *supra.*

114. *Id. See also* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971); note 57 *supra.*

115. *See* Wicker v. Hoppock, 73 U.S. (6 Wall.) 94 (1867); notes 38-39 and accompanying text *supra.*

116. *Bertot* is the only other § 1983 case which seems to implicitly establish a presumption in favor of backpay. 613 F.2d at 250. For a discussion of *Bertot, see* notes 52-57 and accompanying text *supra.*

1983 actions, equal in force to a Title VII backpay presumption, is now operative in the Third Circuit, it is submitted that prospective plaintiffs in employment discrimination cases may conceivably choose to sue under section 1983, rather than Title VII.[117] This choice may be made by the plaintiff if, for example, the Title VII statute of limitations has run, or a good case could be made for punitive damages.[118] Along these same lines, it may also be preferable for handicapped individuals who are victims of employment discrimination to sue under section 1983 rather than the applicable state law prohibiting such discrimination, depending on the state law's scope and procedural restrictions.[119]

It is possible that the holding of *Gurmankin* will be applied to allow plaintiffs in other types of section 1983 cases to enjoy a presumption in favor of backpay. However, the presumption was justified by the Third Circuit in light of the particular circumstances of discrimination in employment based on stereotypical notions of ability in violation of one's constitutional right to be judged as an individual.[120] Therefore, it would seem that the reasoning of this decision is, and should in the future be, limited to the context of unlawful discrimination in the employment.[121]

In conclusion, it is submitted that the majority's position, although not mandated by precedent, shows a sensitivity to the needs of the handicapped, as well as an awareness of the need for make-whole relief in the area of employment discrimination. It would seem that as a result of this decision, plaintiffs similarly situated will have an almost automatic grant of backpay absent a showing of serious countervailing circumstances.[122]

Jean Marie Keeler

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117. A cause of action under § 1983 runs as long as the applicable state statute of limitations. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975). A Title VII action must be filed within 180 days after the discriminatory event, or within 30 days if the plaintiff is a federal employee. *See* 42 U.S.C. §§ 2000e-5(c), 2000e-5(f)(1), 2000e-16(c) (1976). Also punitive damages may be awarded under § 1983. Mansill v. Saunders, 372 F.2d 573, 576 (5th Cir. 1967).

For a discussion of Title VII and § 1983 actions, *see* note 41 and accompanying text *supra.*

118. *See* note 117 *supra.*

119. For a discussion of applicable state laws, *see* note 26 and accompanying text *supra.*

120. *See* 626 F.2d at 1121. *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (establishing that irrebutable presumptions of inability to work violate due process).

121. *See* notes 58-77 and accompanying text *supra.*

122. Serious countervailing circumstances would not be made out merely by a showing of good faith or lack of notice but would require more, for example, the serious financial impact on pension funds that would have resulted in City of Los Angeles v. Manhart, 435 U.S. 702 (1978). For a discussion of *Manhart, see* notes 68-71 and accompanying text *supra.*